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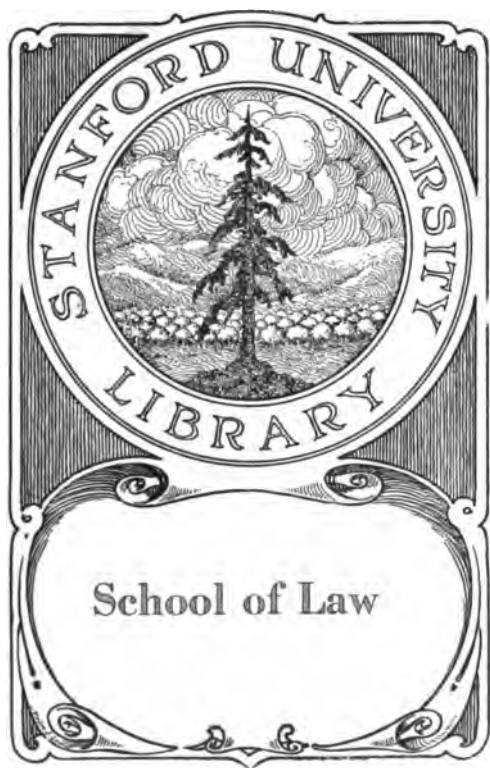
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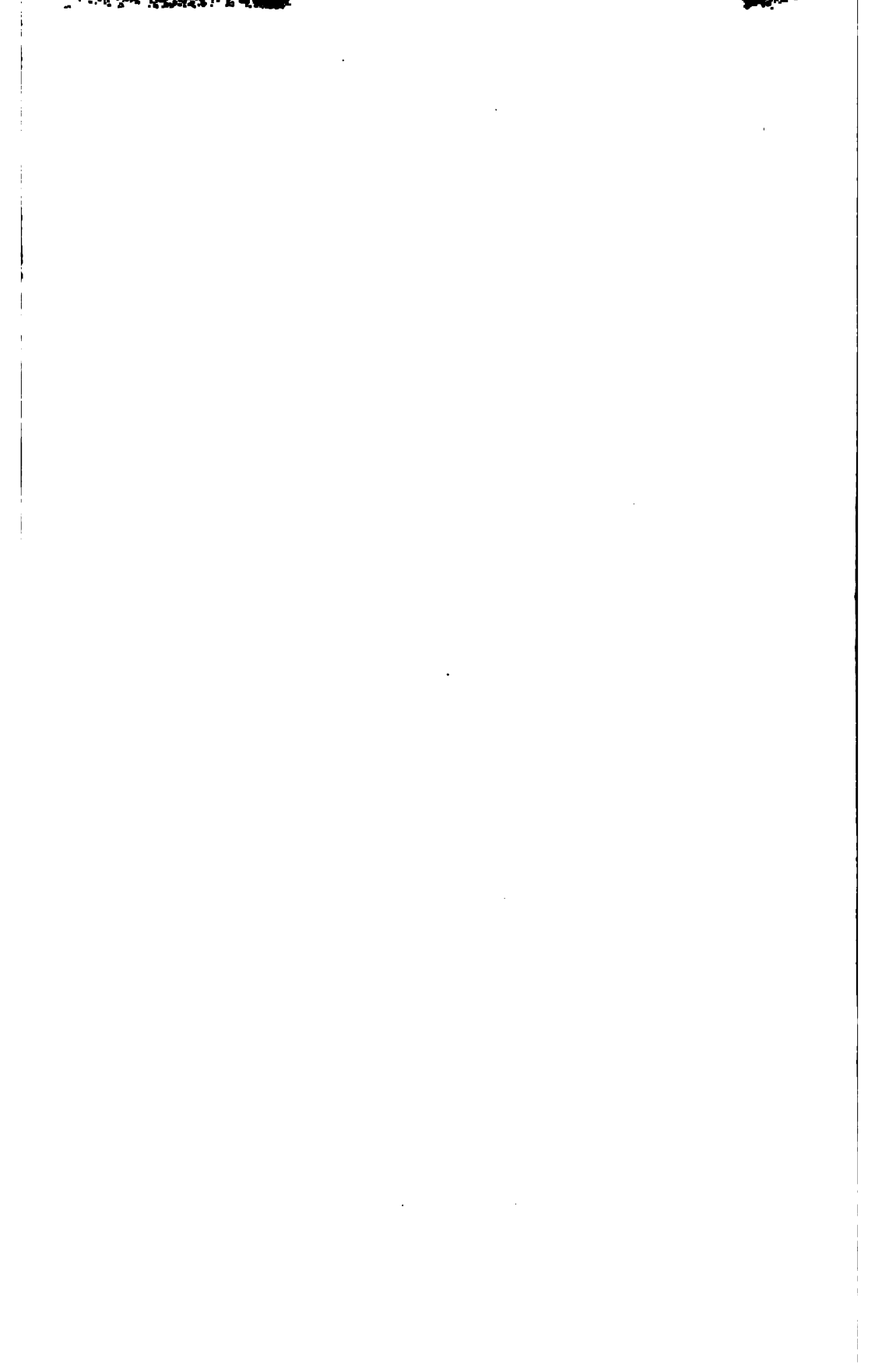
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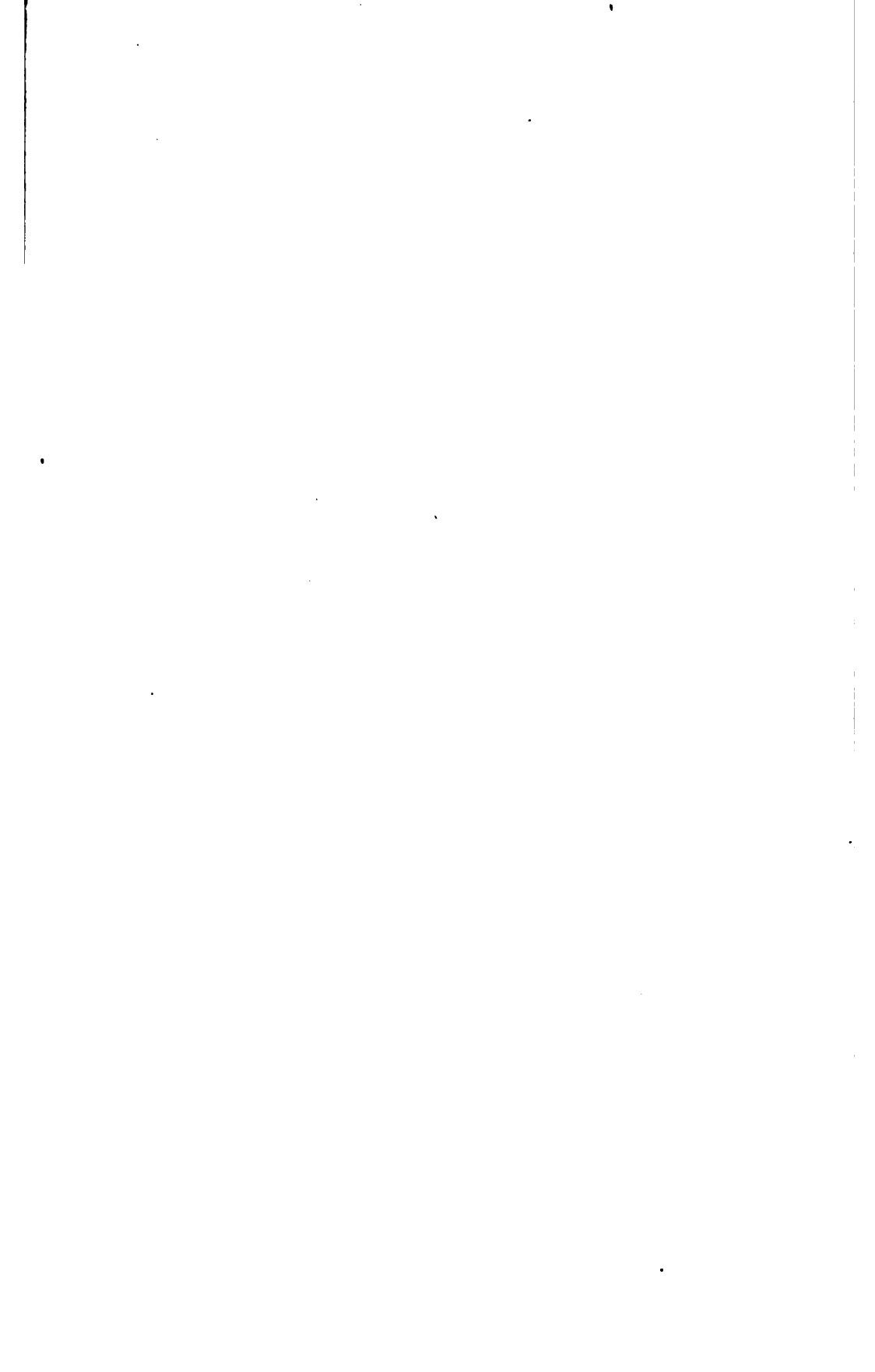


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## LAW REFORM ACT OF 1868.

## DIARY FOR JANUARY.

1. Frid.. *Circumcision*. Taxes to be comp. from this date.
3. SUN.. *2nd Sunday after Christmas*.
4. Mon.. Co. Ct. and Surr. Ct. Term begins. Municipal Elections. Heir and Devisee Sit. com.
6. Wed.. *Epiphany*. Elec. School Trustees. Christmas Vacation in Chancery ends.
8. Frid.. Last day for Township, Vill. and Town Clerks, to make return to County Clerk.
9. Sat.. County Court and Surrogate Court Term ends.
10. SUN.. *1st Sunday after Epiphany*.
11. Mon.. Election of Police Trustees in Police Villages.
15. Frid.. Treas. & Chair. of Mnn. to make ret. to Bd. of Audit. School Rep. to be made to L. S.
16. Sat.. Articles, &c., to be left with Sec. Law Society.
17. SUN.. *2nd Sunday after Epiphany*.
18. Mon.. Municipalities and Munic. Councils (exc. Co.'s) and Tr. of Police Vil. to hold 1st meeting.
19. Tues.. Heir and Devisee Sitings ends.
24. SUN.. *Septuagesima*.
25. Mon.. *Conversion of St. Paul*.
26. Tues.. 1st Meeting of County Councils.
29. Frid.. Examination of Law Students for Call to Bar.
30. Sat.. Sch. Finance Report to Board of Audit. Last day for Co. and Cities to make ret. to P. S. Exam. of Art. Clerks for certif. of fitness.
31. SUN.. *Seagesima*.

THE

## Canada Law Journal.

JANUARY, 1869.

## LAW REFORM ACT OF 1868.

This high sounding title requires an interpretation, otherwise, the uninitiated might confound this effort at law reform on the part of the Attorney-General for Ontario with the result of the learning foresight and perseverance of the eminent men who were instrumental in giving to the country such a measure as the Common Law Procedure Act.

The Act before us, when in the shape of a Bill, was entitled "An Act to reduce the Sitings of the County Courts and General Sessions of the Peace, to abolish Recorders' Courts and for other purposes." The sting is in the tail. The "other purposes" seem to be some of the objects of the Act, and the result of these purposes we propose shortly to discuss. The whole thing has been done so suddenly and so little time for discussion has been given to the interested public that it is now too late to reason upon the necessity for or propriety of such a measure or combat the argument of the supporters of the bill which has, with some amendments, now become law.

We give in another place a copy of the Act as it appears in the *Ontario Gazette*.

The principal features of this Act are these: Recorders Courts are abolished; the Equity

Jurisdiction of the County Courts is done away with; the Terms and Sitings of the County Courts (except in the County of York) are reduced to two in each year; the Courts of General Quarter Sessions, now to be called the Courts of General Sessions of the Peace, are to be held semi-annually; all issues of fact and assessments of damages in actions brought in County Courts may be tried and assessed, in the election of the plaintiff, at any sittings of Assize and Nisi Prius for the county in which the venue is laid; all issues of fact and assessments of damages shall in the absence of a notice to the contrary be heard, tried and assessed by the presiding judge without the intervention of a jury; and lastly, the City of Toronto is re-united for judicial purposes to the County of York.

Some of these changes introduced by the Act will meet with approval, and the expenses of criminal justice may be lessened; but, upon the whole, we venture to assert that the opinion of the judges, the bar, and practitioners generally, is largely opposed to the Act.

Upon the County Judges in those Cities where Recorders Courts have hitherto existed will devolve increased work with reference to criminal business in their capacity of chairmen of the General Session in their respective Counties. But the other changes introduced by this Act will as we shall shew hereafter much decrease their civil business. On the other hand, the criminal business in the Sessions throughout the country will as a rule be reduced, for much of it must necessarily (as there will be only two Sessions in the year and prisoners cannot be kept lying in jail untried) be sent to the assizes to be disposed of. The effect of this will be of course incidentally to swell the calendars at Assizes.

It has been thought by some, that the provisions of this Act respecting the alterations in the Quarter Sessions are unconstitutional, as beyond the powers of the Local Legislature. But we do not pause to consider this at present; and leaving that part to the Act which affects the organization of Criminal Courts (or Criminal procedure if such be the proper reading), we now turn to the sections, commencing with sec. 17, which make some important changes affecting trials and assessments in civil cases.

By 23 Vic., chap. 42, any action depending in either of the Superior Courts of Common

## LAW REFORM ACT OF 1868.

Law in which the amount of the demand is ascertained by the signature of the defendant, and in any action for any debt in which a judge of either of such courts is satisfied that the case may be safely tried in a County Court, such judge may order the case to be tried in the County Court of the County where such action was commenced, &c.

This was an intelligible provision found to be of much benefit to the mercantile community and largely taken advantage of,\* and under which no question could arise as to the proper forum, when the case came on for trial, and it had the advantage of relieving, and was intended to relieve the Superior Court Judges of that part of their Circuit work which could as well be done by an inferior court.

Section 17 is now to stand in the place of this provision, and whilst the new section, as we think, changes the practice for the worse, the subsequent sections in a measure nullify the advantages it might possess. The practice under the new Act provides that all issues, &c., in certain actions in the Superior Courts may be tried in the proper County Court, where the amount is liquidated, or ascertained by the signature of the defendant, "unless a Judge of such Superior Court (does this mean a Judge of the particular Court in which the action is brought, or any Superior Court Judge?) shall otherwise order, and upon such terms as he may deem meet. Now, according to our view, the result of this Act will be to take as much responsibility as possible from the County Court Judges, but here, by what seems to be nothing but a "penny wise" attempt to reduce costs in doing away with the order required by the Act of 28 Vic., very important Superior Court cases may come before County Judges for trial, which is not always to be desired, and the very thing this Act apparently seeks to prevent, but which is impossible under the law still in force. The guarantees that such will not be the case are in the nature of the action, and in the power given to a Judge to "otherwise order." But as to the first, it is notorious that many very special defences may arise in suits where the amount is ascertained (or rather technically supposed to be ascertained) by the signature of the defendant. And in the next place there will be the danger, when an application is made to a judge to "otherwise order" of the parties in a con-

tested case, being in doubt until the last moment whether it will be necessary for them to prepare evidence and summon witnesses for the trial of the cause at the time and place for which notice has been given.

The bill as originally introduced gave no power to a judge to prevent a Superior Court case from being tried before a County Court judge, from which it might be argued that it was not the intention of the former to take away the chance of special cases occasionally coming before the County Courts, but if the proviso means anything, it must mean that a judge is to exercise some discretion with reference to the importance of the case, when a defendant seeks to prevent it being tried before a County Judge. If it only has reference to the time of the trial and not to the difficulties or importance of it, that power is sufficiently given without this provision.

In sub-section 3 of the same section, a difficulty will often arise in practice when an application is made, before trial, to postpone such trial. The application it is said must be made to "a judge of the Court in which the action is brought." If the action is brought in the Queen's Bench a judge of the Common Pleas may be sitting in Chambers. This may be a small matter, but a little more attention to details of this kind is necessary to make the machinery of litigation run smoothly.

It does not seem quite clear whether the next sub-section refers only to Superior Court cases, or to all cases, no matter whether in Superior or County Courts. The words "or unless a Judge of one of the Superior Courts shall otherwise order," would seem to imply the former, and the first part of the clause the latter view.

We presume the word *cause* or *suit* has been accidentally omitted after the words "County Court" in the second line of the 5th sub-section.

As to the two next clauses, if there is one thing that the Judges object to, it is their notes becoming the property of suitors, and with very good reason, as we have explained in a former occasion. Why, by the way, should the unfortunate clerks be made to pay out of their own pockets the cost of these note books. The only answer we apprehend is the "economical one," that no expense should be thrown on the public purse that can by any means, prudential or otherwise, be cast upon private

## LAW REFORM ACT OF 1868.

individuals, without reference of any kind to the moral obligation of the public to pay.

It is not, however, because some of the clauses in this Act are defective in detail and crude in form that we object to it. It is because we think the effect of its principal provisions will work injuriously to the Superior Court judges, to the County Court judges, to practitioners and to the public. This is a sweeping assertion, but we nevertheless think that argument certainly is in our favour, whether experience will prove us to be wrong we know not, but time will tell. If we are wrong we will be the first to note the fact, and be only too glad to do so.

It will scarcely be denied that this Act will largely increase the duties of the Superior Court judges; if they had not enough to do now there would be no harm in this, but such notoriously is not the fact, rather the contrary. Litigation may be less in quantity than formerly, but the special business will increase with the wealth and business of the country, and is increasing. There is, therefore, no reason to suppose that their work is decreasing or will decrease. This Act, we contend will both directly and indirectly increase the duties of the Superior Court Judges, and that not in simple cases only, but in special cases. *Directly*, because there will be two courts less for the trial of civil cases than formerly, and so of necessity County Court suits, where speed is of any object and can by that means be obtained, will be brought down to the assizes for trial, and perhaps for subsequent adjudication in Term, for by section 17, sub-section 5, any motion to be made in respect to any verdict in any County Court cause trial at the Assize shall be heard in one of the Superior Courts of Law in Toronto.\*

*Indirectly*, the business of the Queen's Bench and Common Pleas will be increased, because the inclination will in all special cases be to take cases before Superior Court Judges, and for various reasons—

1. The expense is not thereby increased.
2. Parties will be saved the costs of appeals which might be necessary if the cases were tried in County Courts.

\* Only County Court fees are taxable in such cases, but will Counsel consent to accept fees on that scale under the circumstances? We imagine not. If not, we presume whoever may be the successful party, though successful, will have to lose the difference.

3. There is not the same confidence, as a rule, in the County Judges as in the Superior Court Judges, and clients as well as practitioners will doubtless make their selection in favor of the latter. And this will be especially the case in certain Counties that need not now be specified.

If then the duties of these judges are increased, some part of their work must be neglected, or arrears will accumulate. In either case there will be public dissatisfaction which must eventually bring about a cure, either by a return to the system before the "Law Reform Act," at which time the County Judges will necessarily be less competent for the work than now, or by increasing the number of Superior Court Judges, which would be unobjectionable except on the score of expense, or by increasing the jurisdiction of the Division Courts, a measure which would only make bad worse, for it is absurd to imagine that cases would be *more* satisfactorily disposed of in the hurry of a Division Court, than when they have the safeguards of written pleadings, &c., and the presence of counsel to assist the Judge, combined with the more deliberate investigation in a County Court—clearly, vastly *less* so—certainly the last eventuality would be most deplored by those who are the best acquainted with these Courts, as administered in some counties. It would necessitate some mode of appeal and destroy the advantages of the present system without sufficient to compensate for what would be lost.

So much, then, for the probable effect of this Act as to the Superior Court Judges, and now as to the County Judges.

We do not pretend to say that the County Court Bench is all that could be desired. But we do assert that many of the judges are as efficient, as hardworking, and as learned as any members of the profession who would accept appointments as such. The really first class men at the Bar will not take a County Judgeship; the inducements are not sufficient, except, perhaps, in the County of York. Appointments, also, have been made which did not redound to the credit of the various Governments that made them. But in addition to all this, the very position of a County Judge is a trying one, and it is not every good lawyer that would make a good County Judge. And their tendency is, if anything,

## LAW REFORM ACT OF 1868.—THE NEW DOWER ACT.

to deteriorate rather than to improve, as has been found to be the case even in England.\*

If the special business of the Superior Courts is increased by this Act, the special business of the County Courts will be proportionately decreased. Whatever other effect that may have, it will, we fear, tend to the gradual deterioration in the learning of the County Judges, they will in fact get "rusty;" they are likely to, and doubtless many will become more and more careless and pay less regard to legal principles; decisions when any thing special does come before them will be given more and more at haphazard; practitioners will be "at sea;" the laws will be administered without uniformity, and the general legal business of the country will suffer. The growth of the evil may in some counties, owing to the strength of character of the judge, be slow, but we fear the seeds of evil have been sown.

It is proposed we believe to give to the County Judges jurisdiction in those minor criminal cases which magistrates have hitherto disposed of, to be decided by them on their Division Court circuit. Whatever might be the advantages or disadvantages of such a provision it would not compensate for what the judges will lose in the way we have pointed out.

Attrition of one mind with another of equal, or better if of greater calibre is one secret of judicial success. What the county judges have of this advantage will in a measure be taken away by this Act. Better far to try if some scheme could not be devised to group the judges together so as to have an appeal from one judge to several and so increase the attrition.

As far as the profession are concerned, anything that is injurious to the *status* of the Judges by a reflex process operates injuriously on the profession.

The probable effects, as far as the public are concerned, have already incidentally been considered.

We do not propose at present to discuss other Acts of this Session which effect the tenure of office and dismissal of County Judges, they may possibly be disallowed by the Dominion Government as unconstitutional. But we must in conclusion protest against the absurdity of saying "the county

judges are a bad lot, but we will remedy that by making them worse, though in the process we may do much harm to the country. The Superior Court judges have plenty to do, but we will remedy that by giving them more, though the effect may be to injure the public, and in the end bring things to a somewhat similar but infinitely worse position than they are at present."

Whilst feeling bound to make these observations on some of the provisions of this Act, we are, on the other hand, glad to think that some of the provisions will be beneficial to the public. The decrease in the number of Criminal Courts (we allude particularly to cities,) will be a great boon to that most long-suffering class of men who have, as jurors, to sacrifice themselves for the supposed good of their neighbours, and the expenses of criminal justice will be largely decreased. By sec. 18 of the Act suitors will have the privilege (whether this is an advantage or not is too long a subject for discussion at present,) of having their cases decided by a Judge who can decide both the law and the facts together, and this without the public being deprived of the safeguard of a trial by jury, when such a safeguard is required.

## THE NEW DOWER ACT.

We publish in another place the "Dower Act of Ontario." If any subject required the manipulation of an experienced and careful law framer, this did. Whether it has now received the necessary treatment we are not at present in a position to say; a cursory glance would seem to show some great improvements.

We presume that sections 19 and 48, which at first glance might seem to conflict with each other, mean that the Common Law Procedure Act and Rules of Court are to regulate the practice as far as possible, but when these make no adequate provision, practitioners must fall back on the old practice in dower suits before 10th August, 1850.

Mr. Blake introduced an act to amend this Act, which he alleges will destroy vested rights. It is contained in a few lines:—

"1. The provision in the third section of the said Act contained shall not affect the right of any widow who shall have been married before the first day of February, A. D. 1869, to recover Dower out of any estate to which her husband

\* See "Fallacy of Local Tribunals," ante vol. IV. p. 276.

## THE NEW DOWER ACT.—ITEMS.

shall have been before the said day entitled, and out of which Dower would, but for the said provision, be recoverable.

"2. This Act shall take effect upon, from and after the first day of February, A. D. 1869."

Whatever may have been the rights of widows under the former law in this respect, and they were shadowy enough, the evils of enactments having a retrospective effect should be carefully guarded against. Mr. Blake's bill was thrown out.

### DEATH OF JUDGE DRAPER, OF KINGSTON.

We regret to announce the death of William George Draper, the eldest son of the President of the Court of Appeal, and Judge of the County Court of the County of Frontenac, on Thursday, the 17th December last.

He was a man of very considerable natural ability, and a universal favorite with all who knew him, from his generous and manly disposition. He was favorably known to the profession as the compiler of "Draper's Rules," and a useful handy book on the Law of Dower.

At a meeting of the Bar of Kingston, held on Friday, the 18th ult., Mr. Thomas Kirkpatrick, Q. C., in the chair, the following resolutions were unanimously adopted:—

Moved by Mr. James O'Reilly, Q. C., seconded by Mr. Alex. S. Kirkpatrick,

*Resolved*,—That it is with feelings of the deepest regret that we have heard of the death of William George Draper, Esq., Judge of the County Court of Frontenac, and for many years a leading member of its Bar.

Mr. Draper, in the discharge of the onerous duties of Judge, won the respect and esteem of the community; and by his ability and courteous demeanour towards the Profession, gained their highest regard and confidence. The Bar of Kingston, therefore, with unforgotten sorrow mourn his loss, and sympathise with his widow in her affliction.

Moved by Mr. James Agnew, seconded by Mr. Daniel Macarow,

*Resolved*,—That the Bar, as a mark of respect, do attend the funeral of the late Judge Draper in costume, and do wear mourning for thirty days.

Moved by Mr. J. A. Henderson, D.C.L., seconded by Mr. Thomas Parke,

*Resolved*,—That a copy of the foregoing resolutions be sent to Mrs. Draper.

### INCREASE TO SALARIES OF THE SUPERIOR COURT JUDGES.

In response to a message received by the House of Assembly, from the Lieutenant-Governor, it was moved by Hon. Mr. Wood, seconded by the Attorney-General, that the sum of \$1,000 be granted to each of the Judges of the Superior Courts of Ontario, to be paid out of the Consolidated Revenue Fund. The motion was carried without debate.

It is unnecessary for us to say that we are especially pleased at this, as we have time and again spoken of an increase to the salaries of the Judges, as a matter of simple justice. If the increase had been double what it is, there would have been but a contemptible few to complain of it. But taking it as it is, the suggestion was an admirable one, and gracefully carried out by the Government, who have in this instance, at least, acted in a spirit of liberality which will be appreciated as an act of the truest wisdom and economy. Whether the increase would or would not have come more properly from the Dominion government, we need not at present discuss.

**NECESSARY FUNERAL EXPENSES.**—We find the following in the *Chicago Legal News*, as a part of the proceedings in the court held by the husband of the editress. In the county court of Cook county, of the 8th of October, upon the petition of Captain Wiley M. Egan, administrator of the estate of B. S. Shepard, it appearing that the deceased left four thousand dollars in personal estate, and that he was an old resident moved in good society, and had, in business matters, been the equal of our best business men, it was ordered that the administrator purchase, and place over the grave of the deceased, a monument, to cost not less than one thousand, and not more than fifteen hundred dollars. Some have doubted the power of the proper court to make an order of this character, but the judge said he had no doubt of his jurisdiction to make such an order, and that in the absence of friends, it was the duty of an administrator to bury the deceased, and pay the necessary funeral expenses, and that the word "burial" in the statute meant a decent burial, and that no person was decently buried who had means sufficient for that purpose, unless he had a monument or tombstone at his grave, and that the cost of furnishing the same would be a proper item to allow under the head of "necessary funeral expenses." *Wood v. Vandendur*, 6 Paige, 282; *Stag v. Punter*, 8 Atkyns, 119; Willard on Ex., 272.—*Exchange*.



## ACTS OF LAST SESSION.

## ACTS OF LAST SESSION.

The following are some of the most important of the Acts which were passed last session. Our readers will be glad to see them at once.

## THE LAW REFORM ACT OF 1868.

[Assented to 19th December, 1868.]

Whereas the multiplicity of Courts of inferior jurisdiction entails great and unnecessary expenses upon the country, and it is advisable to amend the laws relating thereto, and to make certain other provisions with a view to lessen such expense: Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Sections thirteen and fifteen of chapter fifteen of the Consolidated Statutes of Upper Canada respecting County Courts, are hereby repealed from the time this Act shall take effect; but nothing herein contained shall invalidate any proceeding theretofore had or taken in any of the County Courts of this Province.

2. The several County Courts of this Province from the time this Act shall take effect, shall hold two terms in each year, to commence respectively on the first Monday in July and January in each year, and end on the Saturday of the same week; except the County Court of the County of York, which last mentioned Court shall hold three terms in each year, to commence respectively on the first Monday in the months of January and April, and the last Monday of August, in each year, and end on the Saturday of the same week.

3. The sittings of the said County Courts for the trial of issues of fact and assessment of damages, shall thenceforth be held semi-annually, to commence on the second Tuesday in the months of June and December in each year; except the County Court of the County of York, which last mentioned Court shall hold three such sittings in each year, to commence respectively on the second Tuesday in the months of March, July and December in each year.

## COUNTY COURTS' EQUITY JURISDICTION—REPEAL.

4. Sections thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty, forty-one, forty-two, forty-three, forty-four, forty-five, forty-six, forty-seven, forty-eight, forty-nine, fifty, fifty-one, fifty-two, fifty-three, fifty-four, fifty-five, fifty-six, fifty-seven, fifty-eight, fifty-nine, sixty, sixty-one, sixty-two, sixty-three, sixty-four, sixty-five, sixty-six, and sixty-nine of the said Statute, chapter fifteen, respecting the equity jurisdiction of the County Courts, are hereby repealed from the time this Act shall take effect, except as to any suit or proceeding then pending; but any suit or proceeding then pending

may be prosecuted and proceeded with as if this Act had not passed.

2. In any suit or proceeding, which, before the passing of this Act, might have been brought, instituted or carried on under the equity jurisdiction of the County Courts, and which may hereafter be brought or carried on in the Court of Chancery, the stamps required, and the fees, costs and charges payable in respect thereof, shall be on a scale bearing, as far as practicable, the same proportion to the stamps, fees, costs, and charges payable in other suits or proceedings in the said Court of Chancery, as the stamps, fees, costs, and charges in actions in County Courts bear to the stamps, fees, costs and charges in actions in the Superior Courts of Common Law; and it shall be lawful for the Judges of the said Court of Chancery to prepare a table of fees, costs and charges applicable to all such proceedings.

5. In amendment of the sixty-seventh section of the said Statute, chapter fifteen, it is hereby enacted that the word "four" shall be struck out of the said section, and the word "ten" be substituted and read in lieu thereof; and in further amendment of the sixty-eighth section of the said Statute, chapter fifteen, and in amendment of the Act of the Parliament of the late Province of Canada, passed in the second session, in the twenty-seventh year of Her Majesty's reign, chapter fourteen, it is hereby enacted that the words "party wishing so to appeal," used in said section sixty-eight, shall for all purposes be taken and held to mean, as well parties on whose behalf, or for whose benefit, any suit is prosecuted or defended, and parties suing or defending in the name of others, though not named on the record as parties so named; and the words "himself and" between the words "by" and "two" shall be struck out of the said section and omitted therefrom.

## GENERAL SESSIONS.

6. Section three of chapter seventeen of the Consolidated Statutes of Upper Canada, relating to Courts of Quarter Sessions of the Peace, is hereby repealed from the time this Act shall take effect.

7. The Courts heretofore known as the Courts of General Quarter Sessions of the Peace in and for the several Counties and Union of Counties in this Province, shall, after this Act takes effect, be called and known as the Courts of General Sessions of the Peace of the respective Counties, and shall thenceforth be held semi-annually, to commence on the second Tuesday in the months of June and December in each year; except in the County of York, in which County the said Courts of General Sessions of the Peace shall be held three times in the year, to commence on the second Tuesday in the months of March, July and December in each year, so that said sittings may come as nearly as may be midway between the sittings of the Courts of Oyer

## LAW REFORM ACT OF 1868.

and Terminer and General Gaol Delivery in and for the several Counties of this Province.

8. The fees and charges payable and pertaining to officers of the County Court, the Jury fees, the Law Stamps of fees of office, and the dues and duties payable to the Crown upon all actions, suits or proceedings, brought in the County Courts and tried or assessed in the Superior Courts, shall be chargeable and paid as if the same were being tried or assessed in the County Courts as hitherto; and no other fees, stamps or dues shall be chargeable thereon, and the Clerk of the County Court shall be entitled to receive and take such part thereof as pertains to him, to his own use.

9. In amendment of section two of chapter eight of the Act of the Parliament of the late Province of Canada, passed in the twenty-third year of Her Majesty's reign, it is hereby enacted that the appointment of Constables and High Constables may hereafter be made at any sitting or adjourned sitting of said Courts of General Sessions of the Peace.

2. Section one of chapter one hundred and twenty-one of the Consolidated Statutes of Upper Canada, entitled "An Act respecting the expenditure of County Funds for certain purposes within Upper Canada," is hereby repealed; and in lieu thereof it is hereby enacted, that all accounts and demands preferred against the County, the approving and auditing whereof heretofore belonged to the Quarter Sessions, shall henceforth be audited and approved by the Magistrates of the respective Counties and union of Counties; and in amendment of section three of the said Act, it is hereby enacted that such accounts and demands shall henceforth be delivered to the Clerks of the Peace of the respective Counties on or before the first day of each General Sessions of the Peace, and of each sitting of the Courts of Oyer and Terminer and General Gaol Delivery in the respective Counties and union of Counties.

3. Such of the said accounts and demands as shall be so delivered on the first day of the sittings of the said Courts of Oyer and Terminer and General Gaol Delivery, shall be audited by a Bench of at least seven Magistrates, of whom the Chairman of the Court of General Sessions of the Peace shall be one, and shall be taken into consideration in the week next succeeding the week in which such sittings ended, and disposed of as soon as practicable, and such of the said accounts and demands as shall be so delivered on or before the first day of the General Sessions of the Peace, shall be audited at the time and in the manner provided by the said Act.

4. In amendment of sections one and four, of chapter one hundred and twenty-four of the Consolidated Statutes of Upper Canada, entitled "An Act respecting the Returns of Convictions and Fines by Justices of the Peace, and of fines levied by Sheriffs," it is enacted, that the returns of convictions and fines by Justices of the Peace therein mentioned, shall

henceforth be made to the Clerks of the Peace instead of the Courts of Quarter Sessions, and shall be made quarterly on or before the second Tuesday in the months of March, June, September and December in each year, and shall embrace, in every instance, all convictions not embraced in some previous returns, and shall be published and fixed up by the Clerks of the Peace in manner in said fourth section provided, within two weeks after the times hereby limited for the making of such returns; and in amendment of section five of the said Act, the words "Minister of Finance of the Province" shall be struck out of said section, and the words "Treasurer of Ontario" inserted in their place.

## RECORDERS' COUNTS—REPEAL.

10. Sections three hundred and sixty, three hundred and sixty-eight, three hundred and sixty-nine, three hundred and seventy, three hundred and seventy-three, three hundred and seventy-five, three hundred and seventy-six, three hundred and seventy-seven, three hundred and seventy-eight, three hundred and seventy-nine, three hundred and eighty-one, three hundred and eighty-two, three hundred and eighty-three, three hundred and eighty-four, three hundred and eighty-five, three hundred and eighty-six, three hundred and eighty-seven, three hundred and eighty-eight, and three hundred and ninety-four of the Act of the Parliament of the late Province of Canada, passed in the session held in the twenty-ninth and thirtieth years of Her Majesty's reign, entitled, "An Act respecting the Municipal Institutions of Upper Canada," and all Letters Patent issued to any Recorder under the said section three hundred and eighty-one, are hereby repealed from the time this Act shall take effect: and the several Recorders' Courts of the cities of Toronto, Hamilton, London, Kingston and Ottawa, as well as also the Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery for the County of the City of Toronto, are from thenceforth abolished; and the said cities shall thenceforth, for judicial purposes, be respectively united to and form part of the several Counties in which they are respectively situate.

11. In lieu of the said section three hundred and seventy-three, it is hereby enacted, that every Police Magistrate shall *ex-officio* be a Justice of the Peace for the City or Town for which he holds office, as well as also for the County or Union of Counties in which such City or Town is situate; and no other Justice of the Peace shall adjudicate upon, admit to bail, discharge prisoners, or otherwise act, except at the Courts of General Sessions of the Peace, in any case for any Town or City where there is a Police Magistrate, except in case of the illness or absence, or at the request in writing of the Police Magistrate.

12. Section three hundred and eight of the said Act is hereby amended by substituting

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the words "Judge of the County Court" for the words "Recorder of the City," and the words "Judge of the said County Court" for the word "Recorder," wherever they respectively occur throughout the said section.

13. In lieu of section three hundred and eighty-seven of the said Act, it is hereby enacted, that in any prosecution, suit, action or proceeding in any civil matter to which a corporation is a party, no ratepayer, member, officer, or servant of the corporation shall, on account of his being such, be incompetent as a witness; but they and every of them, shall be liable to challenge as a juror, except where the Municipal Corporation, the party to such prosecution, suit, action or proceeding, be a County.

14. From the time this Act shall take effect all indictments, suits, proceedings and matters then pending, or commenced in any of the said Recorders' Courts, and not tried and finally determined, ended and completed, shall appertain and be transferred to the several Courts of General Sessions of the Peace of the respective Counties in which the said Cities are respectively situate, and the said Courts of General Sessions of the Peace shall have full jurisdiction and cognizance of all such indictments, proceedings and matters, and all such indictments, proceedings and matters shall be tried, proceeded with, conducted, done, performed and completed in and by the said last mentioned Courts, as if such indictments, proceedings, and matters had originated in or been pending therein.

15. In amendment of the three hundred and ninety-fourth section of the said last mentioned Act, respecting the Municipal Institutions of Upper Canada, it is hereby enacted that the Board of Police in every City shall consist of the Mayor, the Judge of the County Court of the County in which the City is situate, and the Police Magistrate, and if there be no Police Magistrate, the Council of the City shall appoint a person resident therein, to be a member of the Board of Police of such City.

16. After this Act shall take effect, the several powers, duties, matters and things which theretofore appertained to or were authorized, or required to be exercised, done or performed in or by the said Recorders' Courts respectively, are hereby transferred, and shall appertain to and be exercised, done and performed by the Courts of General Sessions of the Peace of the Counties in which the said Cities are respectively situate, and the several duties, powers, acts, matters and things theretofore authorized, or required to be exercised, done or performed by the said Recorders, shall thenceforth be exercised, done and performed by the Judges of the County Courts of said respective Counties.

## TRIALS AND ASSESSMENTS.

17. All issues of fact and assessment of damages in the Superior Courts of common law relating to debt, covenant and contract,

where the amount is liquidated or ascertained by the signature of the defendant, may be tried and assessed in the County Court of the County where the *venue* is laid, if the plaintiff desire it, unless a Judge of such Superior Court shall otherwise order, and upon such terms as he may deem meet, in which case, an entry shall be made in the issue and subsequent proceedings in words, or to the effect of Form A in the schedule to this Act, in place of the *venire facias*; and in the roll the *postea* shall be entered in words, to the effect of Form B in said schedule.

(2.) All issues of fact and assessments of damages in actions in any County Court, may be tried and assessed, at the election of the plaintiff, at any sittings of Assize and *Nisi Prius* for the County in which the *venue* is laid, without any order for that purpose, in which case an entry shall be made in the issue and subsequent proceedings in words, or to the effect of the Form C in the said schedule, and in the roll the *postea* shall be entered in words, or to the effect of Form D. in said schedule.

(3.) In any of the said cases, the notice of trial or assessment shall state that the cause will be tried, or the damages assessed at such sittings according to the fact; and in cases in the Superior Courts where the trial or assessment is intended to be had in the County Court, the issue shall be delivered, and the notice of trial or assessment served, ten clear days before the sittings of such County Court; Provided always, that nothing herein contained shall prevent a Judge of the Court in which the action is brought, or after the record is entered for trial or assessment, the Judge before whom the trial or assessment is intended to be had, from entertaining applications to postpone such trials or assessments.

(4.) Subject to the provisions herein contained, the record shall be made up, and entered and tried as in other cases; and in any of the said cases judgment may be entered on the fifth day after verdict rendered or damages assessed, unless the Judge who tried the cause shall certify, on the record under his hand, that the case is one which, in his opinion, should stand to abide the result of a motion that may be made therein in term, or unless a Judge of one of the Superior Courts shall otherwise order: Provided always, that in any such case the Judge may certify for immediate execution.

(5.) Any motion to be made in respect to any verdict or assessment of damages in any County Court, tried or assessed at any sittings of Assize and *Nisi prius*, shall be made, heard and determined in the Superior Court of Law at Toronto, which the party moving or applying shall elect, and according to the practice of that Court; and any rule or order made in such cause by such Court shall be valid and binding.

(6.) The Clerks of the several County Courts shall provide books in which the Judges sit-

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ting in the Courts of Assize and *Nisi prius*, where cases brought in any County Court shall be tried or assessed under this Act, may enter their notes of such trials and assessments; which books, immediately after such trials or assessments, shall be returned to and remain in, the offices of such Clerks.

(7.) On the application of any of the parties, the County Court Clerks shall, at the cost of such party, forward to the Clerk of the Crown and Pleas at Toronto of such of the Superior Courts as such party shall designate, a certified copy of the Judge's notes of the trial or assessment of any such cases, together with the record and exhibits, to enable such Superior Court properly to dispose of any application made, or to be made in or respecting such cases.

(8.) The costs on all such proceedings in the said several Courts, shall be the usual cost of such cases in the Court in which the action is brought.

18. In amendment of the second section of of chapter thirty-one of the Consolidated Statutes of Upper Canada, entitled *An Act respecting Jurors and Juries*, it is enacted.—

(1.) That all issues of fact in any civil action when brought in either of the Superior Courts of Common Law, or in any of the County Courts in Ontario, and every assessment or enquiry of damages in every such action, may, and in the absence of such notice as in the next sub-section mentioned, shall be heard, tried and assessed by a Judge of the said Courts, without the intervention of a Jury;

(2.) Provided that if any one or more of the parties requires such issue to be tried or damages to be assessed or enquired of by a Jury, he shall give notice to the Court in which such action is pending, and to the opposite party, a notice in writing to the effect following, that is to say:—

“The Plaintiff (or one or more of them) or the Defendant or one or more of them as the case may be, requires that the issues in this cause be tried, (or the damages assessed) by a Jury, and a copy of such notice shall be attached to the record.” (*Sic.*)

(3.) That the verdict or finding of the Judge by whom any such issue shall be tried or damages assessed, shall have the like effect, as the verdict or finding of a jury, and the like fees and charges shall be payable in respect of the same: Provided that the parties shall be entitled to move against such verdict or finding by motion for non-suit, new trial or otherwise, within the same time, and on the same grounds (including objections against the sufficiency or the erroneous view taken of the evidence) as allowed in cases of trial or assessment by a jury.

(4.) That whenever any one or more of the parties to any such action shall have given such notice, requiring a jury as hereinbefore provided, the cause shall be carried down to trial in the same manner and with the like effect as if this section had not been passed;

Provided always, that it shall be competent for the parties present at the trial to consent that the said notice shall be waived, and the case tried or damages assessed by the Judge, and to endorse a memorandum of such consent upon the record, and thereupon the said Judge shall proceed to the trial of the issues or assessment of the damages without the intervention of a jury.

(5.) Provided always, that it shall be competent for the Judge in his discretion to direct, that notwithstanding anything hereinbefore contained, any such action shall be tried or the damages assessed by a jury.

19. Sections ten, one hundred and thirty-two, one hundred and thirty-three, one hundred and thirty-four, one hundred and thirty-five, one hundred and thirty-six, and one hundred and thirty-seven of the said Act, entitled *An Act respecting Jurors and Juries*, are hereby repealed.

20. Section fifty-one of the said Act as amended by the Act passed in the twenty-sixth year of Her Majesty's Reign, chapter forty-four, entitled “An Act to amend the Consolidated Act of Upper Canada intituled An Act respecting Jurors and Juries,” is hereby further amended by inserting next after the words “Deputy Sheriff of the County” in the fifth section of said last mentioned Act, the words “and the Junior Judge of the County Court, and the Mayor of any City situate in such county.”

21. The words “The Governor” in section fifty-eight of the said Act, shall be held to mean “The Lieutenant-Governor of this Province,” and the words “The Official Gazette of the Province” and “The Gazette” in the said section, shall be held to mean “The Ontario Gazette.”

## CITY OF TORONTO RE-UNITED TO THE COUNTY OF YORK.

22. Sections one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, and fifteen of the Act of the Parliament of the late Province of Canada, passed in the twenty-fourth year of Her Majesty's reign, chapter fifty-three, entitled “An Act to provide for the separation of the City of Toronto from the United Counties of York and Peel for certain judicial purposes,” and also the Act passed in the twenty-fifth year of Her Majesty's reign, chapter twenty-four, entitled “An Act to explain the Act to provide for the separation of the City of Toronto from the United Counties of York and Peel,” are hereby repealed from the time this Act shall take effect; and the City of Toronto shall thenceforth, for judicial purposes, be re-united to, and be part of County of York.

2. All recognizances conditioned that any person, whether as witness, prosecutor, defendant or otherwise, shall appear at any Recorder's Court of any City, to be held next after the time this Act shall take effect, shall be obligatory to compel the appearance of such

## DOWER ACT OF 1868.

party at the Court of General Sessions of the Peace of the County in which the City is situate, to be held next after this Act shall take effect, and the conditions of all such recognizances shall be construed as if so expressed; and all recognizances conditioned that any person, whether as witness, prosecutor, defendant or otherwise, shall appear at any sitting of the Court of Oyer and Terminer or General Gaol Delivery for the County of the City of Toronto, to be held next after this Act shall take effect, shall be obligatory to compel the appearance of such party at the sitting of the Courts of Oyer and Terminer and General Gaol Delivery for the County of York, which shall be held next after the passing of this Act, and the condition of all such recognizances shall be construed as if so expressed.

23. Nothing herein contained shall render invalid any indictment, information, action, or proceedings heretofore prosecuted, had, taken or pending in any sitting of the Courts of Assize and *Nisi Prius*, Oyer and Terminer, or General Gaol Delivery for the County of the City of Toronto; but all such indictments, informations, actions and proceedings shall be transferred to, and may be continued, prosecuted and proceeded with in the Courts of Assize and *Nisi Prius*, Oyer and Terminer and General Gaol Delivery for the County of York.

24. Nothing in this Act contained shall alter or affect the existing arrangements between the City of Toronto and the County of York respecting the use of the Gaol.

25. All enactments inconsistent with any of the provisions of this Act are hereby repealed, but no Act previously repealed shall be thereby revived.

26. This Act shall take effect from and after the first day of February next.

## FORM A.

And the plaintiff, in order to expedite proceedings in this case, having elected to try the issues (or *assess the damages* or *as well to try the issues as to assess the damages, as the case may be*) at the sittings of the County Court of the County of —, to be held at —, in the said County, on the — day of —, 18—, the said issues will be tried (or *the said damages will be assessed, or both as the case may be*) at the said sittings accordingly.

## FORM B.

And the Jury (or *Judge*) at the said County Court found that (*stating the finding on the issues, or as the case may be*) and the Jury (or *Judge*) at the said County Court assessed the damages of the plaintiff at — over and above his costs; therefore, it is considered, &c., (*as the case requires*).

## FORM C.

And the plaintiff, in order to expedite proceedings in this case, having elected to try the issues (or *assess the damages* or *both as the*

*case may be*) at the sittings of Assize and *Nisi Prius*, to be holden at —, in and for the County of —, on the — day of —, 18—, the said issues will be tried (or *the said damages will be assessed, or both as the case may be*) at the said sittings accordingly.

## FORM D.

And the Jury (or *Judge*) at the said sittings of Assize and *Nisi Prius* found that (*stating the finding on the issues or as the case may be*) and the Jury (or *Judge*) at the said sittings of Assize and *Nisi Prius* assessed the damages of the plaintiff at — over and above his costs; therefore, &c., (*as the case requires*).

## AN ACT

*To alter the Law of Dower and to regulate proceedings in actions for the recovery of Dower in Upper Canada.*

[Assented to 19th December, 1868.]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. The twenty-eighth chapter of the Consolidated Statutes of Upper Canada, intituled: *An Act respecting the procedure in actions of Dower* and the Act passed in the twenty-fourth year of Her Majesty's Reign, intituled: *An Act for the better assignment of Dower in Upper Canada*, are repealed upon, from and after the day this Act shall come into force.

2. All actions of right of dower or of dower *unde nihil habet* shall be brought and carried on according to the provisions of this Act.

3. Dower shall not be recoverable out of any separate and distinct lot, tract or parcel of land, which, at the time of the alienation by the husband or at the time of his death, if he died seized thereof, was in a state of nature, and unimproved by clearing, fencing or otherwise for the purpose of cultivation or occupation; but, this shall not restrict or diminish the right to have woodland assigned to the demandant under the thirty-first section of this Act, from which it shall be lawful for her to take firewood necessary for her own use, and timber for fencing the other portions of land assigned to her of the same lot, tract or parcel.

4. Every action for dower shall be commenced by writ of summons, which shall be addressed to the person in actual possession of the land out of which dower is claimed, and to every other person who is tenant of the freehold of the same land, and in every such writ, and in every copy thereof, the place and county of the residence and abode of each party defendant shall be mentioned, and the land or property out of which dower is claimed shall be described by the number of the lot or otherwise, with reasonable certainty, and such writ shall be tested as in personal actions, and may be according to the form following:

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VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To ——— of ——— [*naming each defendant and the place and county of the residence and abode of each defendant.*]

We command you (*and each and every of you*) that you render to ——— who was the wife of ——— now deceased, her reasonable dower which falleth to her of the freehold which was of the said ——— her late husband, of and in (*describe the land and property by the number of the lot, or the part of the lot, concession, name of the Township, City, Town or place, or with such other reasonable certainty as will shew out of what land and property dower is claimed,*) and whereof she complains that you deforce her, or that you appear within sixteen days either to disclaim any right or estate of freehold in the said land and property, or to defend yourself against her claim.

Witness, &c.

5. Every such writ shall bear date on the day on which it is issued, and shall be issued out of the proper office, in the county wherein the lands lie, and shall be in force for six months, and shall be returnable on the sixteenth day after service thereof, and shall be indorsed with the name and place of abode of the Attorney suing out the same, or (if no Attorney) the name and residence of the demandant shall be indorsed thereon in like manner, as the indorsements on writs of summons in personal actions; and the same proceedings may be had to ascertain whether the writ was issued by the authority of the Attorney whose name appears indorsed thereon, and who the demandant is, and her abode, and as to the staying proceedings upon writs issued without authority as in personal actions.

6. On every such writ and on each copy thereof shall be indorsed a notice addressed to the defendants, which may be to the effect following:—"You are served with this writ to the intent that you may enter an appearance and denial that you are tenant of the freehold of the lands mentioned in the writ, or that you may enter only an appearance; and take notice that unless within sixteen days of the service hereof, you enter an appearance with or without such denial, the demandant will have a right to sign judgment to recover as against you the dower claimed with costs of suit."

7. In case the demandant claims damages for detention of her dower, such notice shall contain a further statement that the demandant claims damages for the detention of her dower from some day to be stated in the notice.

8. Any defendant named in the writ may appear within the time appointed, and with the appearance may file a notice addressed to the demandant setting out that he denies that he is tenant of the freehold of the lands men-

tioned in the writ, which denial shall as against that individual defendant be taken to admit the claim of the demandant to dower as stated in the writ.

9. Any defendant named in the writ may appear within the time appointed, and by filing an appearance without such denial, shall be taken to admit that he is tenant of the freehold, and shall not afterwards be allowed to deny the same.

10. Every tenant in possession, who is not also tenant of the freehold and who is served with a writ under this Act, shall forthwith give notice thereof to his landlord or other person under whom he entered into possession, under the penalty of forfeiting the value of three years' improved rent of the premises in the possession of such tenant, to the person under whom he entered in possession, to be recovered by action of debt to be brought in either of the Superior Courts of Common Law in Ontario.

11. The landlord or other person under whom such tenant, as is mentioned in the next preceding section, holds or entered into possession, may, if he has not been served with the writ of dower, apply to the Court or a Judge upon affidavit, that he is tenant of the freehold, and is advised and believes that there is good ground for disputing the demandant's claim to dower, and the Court or Judge may, after summons to or rule upon the demandant, order that such applicant be substituted as defendant in the action, in lieu of the tenant in possession, upon such conditions as shall to the Court or Judge appear just.

12. If no person be in actual occupation of the lands of which the demandant claims dower, the writ shall nevertheless be served on the tenant of the freehold, who shall be named therein.

13. The writ of summons may be served in Ontario, and the service shall be personal whenever that is practicable, but the demandant may, on affidavit, apply from time to time, either to the Court out of which the writ issued or to a Judge of either Court in Chambers, and if it appear to such Court or Judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of defendant, or that he wilfully evaded service of the same, and has not appeared thereto, such Court or Judge may, by rule or order, grant leave to the demandant to proceed as if personal service had been effected, subject however to such conditions as to the Court or Judge seem fit.

14. In all cases where the tenant of the freehold resides out of Ontario, the demandant may issue a writ of summons in the form above set forth by giving a sufficient number of days, not less in any case than twenty one, for the defendant to appear, according to the distance of the place of the defendant's residence, and having due regard to the means of and reasonable time for postal or other communication; which writ of summons shall bear the same

## DOWER ACT OF 1868.

indorsement and notice or notices as the writ of summons hereinbefore set forth, making such changes as the nature of the case renders indispensable.

15. Upon the Court or Judge being satisfied that such writ has been personally served upon the defendant, or that reasonable efforts have been made to effect personal service thereof on the defendant so resident out of Ontario, and that it came to his knowledge, and that he has not appeared, such Court or Judge may from time to time, direct that the demandant may proceed in the action in like manner as if the defendant had been served under this Act in Ontario, subject to such conditions as to such Court or Judge may seem fit, having regard to the time allowed to the defendant to appear being reasonable, and to the other circumstances of the case.

16. Any defendant named in the writ may, within the time appointed, file an appearance and acknowledgment that he is tenant of the freehold of the land named in the writ, together with his consent that the demandant may have judgment for her dower therein, and may take the proceedings authorised by this Act to have the same assigned to her, unless the parties shall otherwise agree, and he shall forthwith serve the demandant or her attorney with a copy of such appearance, acknowledgment and consent, together with an affidavit of the day of the entering and filing the same in the proper office, and in every such case when the defendant so admits the right to recover, the demandant may enter judgment of seizin forthwith, and may obtain a writ of assignment of dower in manner hereinafter specified, but she shall not be entitled to tax or recover the costs of suit or entering such judgment against the defendant.

17. In case an appearance be entered with a denial by the defendant that he is tenant of the freehold, the demandant may at once and without further pleadings take issue on that denial and make up an issue book, setting out the writ, the appearance and denial and the issue thereon, and may give notice of trial and proceed to trial as in personal actions, and if she obtains a verdict she shall be entitled to costs and to enter judgment of seizin of her dower, as against such defendant.

18. In case only an appearance be entered, the demandant may at once declare, and when damages are claimed in the writ, they may also be claimed in the declaration which may be to the effect following:

*(The Rule of the Court.)*

In the County of ——— to wit:

The ——— day of ———, 18—.

A. B. widow, (as the case may be) who was wife of C. B. deceased by ——— her attorney, demands against (the defendant) the third part of (the land and premises as described in the writ) with the appurtenances in the (township, &c.) of ——— in the said county of ——— as the dower of the said A. B. of the endow-

ment of C. B., deceased, heretofore her husband, whereof she had nothing (and if damages are claimed) and she also claims damages for the detention from her of her endowment in the said lands from the ——— day of ——— 18— and she claims \$——

19. The several enactments in the Common Law Procedure Act relative to pleas, demurrers, replications and subsequent pleadings, and the periods appointed within which the same must be pleaded, and in which notice of trial must be given and countermanded, and as to amending pleadings, and as to practice not herein provided for, and making all or any other amendments, and as to the authority of the Court or of a Judge in such matters, and also the rules of Court, from time to time in force relative to pleading and practice, shall, so far as they can be made applicable, and are not at variance with this Act, be in force and apply to and regulate the course and practice of pleading and procedure in actions of dower.

20. Special cases may be stated by leave of the Court or a Judge in like manner as in other actions.

21. In estimating damages for the detention of dower or the yearly value of the lands, for the purpose of fixing a yearly sum of money in lieu of an assignment of dower by metes and bounds, the value of permanent improvements made after the alienation of the lands by the husband, or after the death of the husband, shall not be taken into account; but such damages or yearly value shall be estimated upon the state of the property at the time of such alienation or death, allowing for the general rise, if any, in the price and value of land in the particular locality.

22. No action of dower shall be brought but within twenty years from the death of the husband of the demandant.

23. No such action shall be hereafter maintained, in case the demandant has joined in a deed to convey the land or to release her dower therein to a purchaser for value, although the acknowledgment required by law at the time may not have been made or taken, or though any informality may have occurred or happened in the making, taking or certifying such acknowledgment.

24. All actions of dower which shall be pending at the time this Act shall come into force, may be continued and carried on to judgment in like manner as if this Act had not been passed.

25. Unless where it is in this Act expressly declared to the contrary, costs shall be taxed and allowed to, and be recoverable by either party in an action of dower, in like manner as in personal actions, and writs of execution to levy the same with damages, where damages have been adjudged, may be sued out and executed as in personal actions.

26. After judgment has been rendered in the demandant's favour to recover dower, whether with or without costs or damages,

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she shall be entitled to sue out a writ of assignment of dower, founded upon such judgment, directed to the sheriff of the County in which the lands lie, in which writ shall be set forth the lands out of which the demandant has recovered judgment to recover her dower.

27. The sheriff, on receipt of such writ, shall by writing under his seal of office, appoint two resident freeholders of his county who are rated on the assessment roll for real estate of a value not less than two thousand dollars each, and a licensed deputy provincial surveyor, and each of whom would in other respects be eligible to serve as a juror between the parties named in the said writ, to be Commissioners to admeasure the dower, and the sheriff shall in such writing set out a copy of the writ of assignment, and shall name therein a day on or before which the Commissioners shall make and return to him a report of their proceedings and determination in the execution of the duty assigned to them.

28. In case of the death of, or refusal by any or all of the Commissioners so appointed, the sheriff shall, from time to time, in like manner appoint another or others to perform the duty of such as die or refuse.

29. Every Commissioner so appointed shall, before entering upon the execution of his duty, take and subscribe an affidavit in the form or to the effect following, which oath any person duly authorized and appointed to take affidavits in the Superior Courts of Common Law, is hereby empowered to administer, and the said Commissioners shall annex to their report the affidavits sworn by them, and return them to the sheriff.

"I ———, do swear that I am not of kin "to the demandant (*naming her*) nor to the "defendants (*naming him or them*) nor in any "way interested in the lands out of which the "assignment of dower is to be made by me, "and that I will honestly, impartially, and to "the best of my skill and ability, execute and "perform the duties imposed upon me by the "appointment of ——— Esquire, Sheriff of "the county of ——— as a Commissioner for "the admeasurement of dower between the "said demandant and the said defendants according to law."

30. After taking and subscribing such affidavit, the Commissioners and each of them shall, for all purposes in the fulfillment of the duties by law required of them, be considered as officers of the Court out of which the writ of assignment issued, and shall be entitled to the same immunities and protection and be subject to the same liabilities and proceeding as a Sheriff in the discharge of his duty.

31. It shall be the duty of the Commissioners—

(1.) To admeasure, designate and lay off without delay, by sufficient marks, descriptions, boundaries or monuments, one-third of the lands and premises mentioned in the writ of assignment, according to the nature of the land, whether meadow, arable, pasture or wood-

land, being a part of the lot or parcel of land and premises mentioned in the writ, and having always due regard to the nature and character of the buildings and erections on such lands and premises.

(2.) To ascertain and determine what permanent improvements have been made upon such lands and premises since the death of the demandant's husband, or since the time her said husband alienated the same to a purchaser for value, and if it can be done, they shall award the dower out of such part of the lands as do not embrace or contain such permanent improvements, but if that cannot be done, they shall deduct either in quantity or value from the portion to be by them allotted or assigned to the demandant in proportion to the benefit she may or will derive from the assignment to her as part of her dower of any part of such permanent improvements;

(3.) If, from peculiar circumstances, such as there being a mill or mills or manufactory upon the land, the Commissioners cannot make a fair and just assignment of dower by metes and bounds, they shall assess a yearly sum of money being as near as may be one-third of the clear yearly rents of the premises after deducting any rates or assessments payable thereon, and in assessing such yearly sum they shall make allowances and deductions for permanent improvements, as above provided for, and in their report to the Sheriff, they shall state the amount of such yearly sum and set forth all the evidence taken by them in relation to the same, such evidence to be reduced to writing and taken upon oath (which any one of the Commissioners is hereby authorized to administer), and to be subscribed by the witness examined;

(4.) Such yearly sum shall be a lien upon the lands mentioned in the writ of assignment, unless the Commissioners specially direct otherwise and make the same issuable and payable out of some specific portion of such lands, and the same shall be recoverable by distress as for rent or by action of debt against the tenant of the freehold for the time being;

(5.) The report of the Commissioners shall be in writing, subscribed by them and directed to the Sheriff and shall contain a full statement of their proceedings, and, where the dower is assigned by metes and bounds, shall distinctly point out and describe the same and the posts, stones or other monuments designating the boundaries, and, for the purpose of planting and marking such posts, stones or monuments, they may, if necessary, employ chain-bearers and labourers.

32. The Sheriff may in his discretion upon the request of the Commissioners, enlarge the time for making their report, for not more than ten days, and he shall, within twenty-four hours after the receipt thereof, endorse thereon the day and hour of such receipt, and he shall then forthwith return the writ of admeasurement of dower, together with the report and all papers annexed thereto, to the



## DOWER ACT OF 1868.

office wherein the suit was commenced and carried on, and the Deputy Clerk of the Crown, into whose office such writ and other papers have been returned, shall, on the application of either party, transmit the same to the proper principal office in Toronto, in like manner, and on the same conditions as he is required to transmit any record of *Nisi Prius* and subject to the same liabilities, in case of his default.

88. Either party may, after the expiration of ten days from the filing of the Sheriff's return to the writ of assignment, provided such ten days have elapsed before the first day of the term next after such filing, and if not, then within the first four days of the succeeding term, apply for, and the Court may grant a rule calling on the opposite party to shew cause why the Commissioners' report should\* be set aside upon grounds apparent on the report and papers filed therewith, and upon such other grounds as the Court may see fit, the same being supported by affidavit, and every such ground being set forth in the rule; and the Court, after hearing the parties may order the report to be varied or amended, if in their judgment they have sufficient matter before them to amend by, or may annul and set aside the report, and may appoint three new Commissioners or direct that the sheriff shall do so, and such new Commissioners shall have the same powers and execute the same duties and be subject to the same conditions and responsibilities as are in that behalf hereinbefore expressed, and the report of such new Commissioners shall be treated as if no other report had been previously made and shall be dealt with and proceeded upon accordingly.

84. If the report is moved against upon the ground of any misconduct or fraud on the part of the Commissioners, the Court may, in its discretion, make them parties to the rule, and if wilful misconduct or fraud be established in the opinion of the Court, the report may be set aside and the Commissioners be adjudged to pay the parties injured all the costs which have been incurred and have been rendered useless by such misconduct or fraud, and all the costs of the rule to set aside the report, and such payment may be enforced by the like process and proceedings as are or may be in use to compel a sheriff to pay costs of any rule or summary proceeding against him.

85. The rule to set aside the report may be discharged with or without costs, and the Court may order the party at whose instance, or on whose complaint or representation, the Commissioners may have been parties to the rule, to pay such Commissioners their costs of answering the same, and if the rule be discharged, or if the report be not moved against within the proper time, or if the court refuse to grant a rule to shew cause, the report shall thenceforth be final and conclusive on all parties to the dower action, and a copy of such

report, certified by the clerk of the Crown, under the seal of the Court, shall be registered in the Registry office of the county or place where the lands lie, for which service the Registrar shall be entitled to receive one dollar.

86. After such registration the demandant shall be entitled to sue out a writ directed to the proper sheriff, commanding him to put her into possession of the lands and premises assigned and admeasured to her for her dower, and to levy all such costs as by the judgment and any rule of Court, or either, shall have been awarded to her against the tenant.

87. In case judgment shall have been given against the demandant and costs be awarded to be paid by her to the defendant by such judgment, or by any rule of Court, such defendant may issue a writ of *feri facias* to recover the same.

88. In case it is desired by either party to produce any witnesses before the Commissioners, such party may, on application to the Court out of which the writ of assignment issued, or to any Judge of either of the Superior Courts of Common Law, on affidavit that the evidence of any such witness is necessary, obtain an order commanding the attendance of any such witness before the said Commissioners, and, if in addition to the service of such order, an appointment of time and place of attendance in obedience thereto, signed by one of the Commissioners, be served on the person whose evidence is required, either with or after the service of the order, non-attendance shall be deemed a contempt of Court, and shall be punishable accordingly, but the person required to attend shall be entitled to be paid the same fees, allowance and conduct money as if he had been subpoenaed as a witness in an ordinary suit, and no witness shall be obliged to attend more than two consecutive days.

89. The Commissioners shall be entitled to receive from the demandant the sum of four dollars for each day's attendance, not, however, to exceed two, and may also charge at the rate of twenty cents for every hundred words for drawing up their report, and ten cents for every hundred words of each copy furnished by them to either party.

40. The demandant shall pay the cost of suing out, and the cost of the Commissioners in executing the writ of assignment of dower and making the report thereof, but each party shall pay his own costs of witnesses, or of attorney or counsel attending before the said Commissioners.

41. The demandant and the tenant of the freehold may, by any instrument under their respective hands and seals, executed in the presence of two credible witnesses, agree upon the assignment of dower, or upon a yearly sum, or a gross sum to be paid in lieu and satisfaction of dower, and a duplicate of such instrument proved by the oath of one of the subscribing witnesses, which oath any Commissioner duly appointed for taking affidavits may administer, shall be registered in the

\* *Quere*—"Not" omitted.—Ebs. L. J.

## ACTS OF LAST SESSION.

Registry office of the county where the lands lie, and shall entitle the demandant to hold the land so assigned to her, against the assignor and all parties claiming through or under him, as tenant for her life, or to distrain for, or to sue for, and recover in any Court having jurisdiction to the amount, the annual or other sum agreed to be paid to her by such tenant of the freehold, and such instrument so registered shall be a lien upon the land for such yearly or other sum, and shall be a bar to any other action, suit or proceeding by the demandant for dower in the lands mentioned therein.

42. The several clauses of this Act, numbered from twenty-six to forty, both inclusive, shall not apply to or affect cases in which the right to dower became consummate by the death of the husband, before the eighteenth day of May, which was in the year of our Lord one thousand eight hundred and sixty-one.

43. In all cases not otherwise provided for by this Act, the pleadings and proceedings shall be regulated by the law as it was in force in Upper Canada, relative to suits and actions of dower, before the tenth day of August, which was in the year of our Lord one thousand eight hundred and fifty.

44. This Act may be cited as *The Dower Act of Ontario*, shall take effect upon, and from and after the first day of February next.

## AN ACT

*To amend the Law as to Wills.*

[Assented to 19th December, 1868.]

Whereas it is expedient to amend the law as to Wills, Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Every Will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the Will.

2. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised (except an act by which the Will is revoked) shall prevent the operation of the Will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of at the time of his death.

3. Every will shall be revoked by the marriage of the testator, except a Will made in exercise of a power of appointment when the real or personal estate thereby appointed would in default of such appointment, pass to the testator's heir, executor or administrator, or the person entitled as the testator's next of kin under the statute of distributions.

4. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

5. No Will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another Will or codicil executed according to law, or by some writing declaring an intention to revoke the same, and executed in the manner in which a Will is by law required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some one in his presence and by his direction, with the intention of revoking the same.

6. This Act shall not apply to the Will of any person who is dead before the first day of January, one thousand eight hundred and sixty-nine.

## AN ACT

*To amend the Registry Act, and to further provide as to the Certificates of Married Women, touching their consent as to the execution of Deeds of Conveyance.*

[Assented to 19th December, 1868.]

Whereas it is desirable to amend the Registry Law of Ontario, so far as to give certainty to the right of married women jointly with their husbands to execute certificates of discharge of mortgage: Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. From and after the passing of this Act, when any registered mortgage of lands wherein a married woman may happen to be a mortgagee therein, or whereof the assignee is a married woman, shall have been satisfied, the Registrar, on receiving a certificate, executed jointly by such married woman and her husband, in the form prescribed by the Registry Act of Ontario, shall register such certificate in the same manner provided by said Act for registering certificates of discharge of mortgage, and such certificate shall be deemed a discharge of such mortgage to the same effect as any other certificates registered under the said Act; and it shall not be necessary to produce any certificate of such married woman having been examined before any Judge or Justice of the Peace touching her consent therein in anywise, nor shall such examination be necessary.

2. In case more than one married woman executes the same deed of conveyance mentioned and referred to in the second section of chapter eighty-five of the Consolidated Statutes of Upper Canada, the Judge or Justices of the Peace therein mentioned, may include the examination and names of all or any number of such married women in one certificate in the form mentioned and set out in said section as far as applicable.

## A MINISTRY OF JUSTICE.

## SELECTIONS.

## A MINISTRY OF JUSTICE.

In addressing the electors of the Elgin District of Burghs last week, Mr. Grant Duff handled the subject of law reform. There were, he said, many signs that in Scotland, as in England, great changes in the law were needed. The most necessary changes, in his opinion, were the substitution of a code for our voluminous law libraries; an improved system of legal education to rear lawyers fit to reason from principles rather than decisions; and an assimilation of the English and Scotch systems of law, "so as to permit of their being fused together." "This consummation," said Mr. Grant Duff, "we shall not see, but there is a change in our arrangements which I hope we may see—the creation of a Minister of Law and Justice in England and Scotland." The suggestion that we should have a government department for law and justice is not new; but little has been heard of it of late, and it may be worth while briefly to consider whether it is a suggestion that ought to be seriously entertained.

It might be too much to say that there was a presumption in favour of such a department derivable from the experience of other States. The British government system is "so much better than any other" that, instead of seeing ground for such a presumption in the fact that other States have a department of Law and Justice, many might regard our being without one, a fundamental point of superiority in our system over the others. Let us note, however, at what it is worth the singularity of our position in regard to this matter. If any one will take the trouble to look into that useful work, the "Statesman's Year Book," he will see that there is no State of any pretension, except our own and the United States of America, without a Ministry of Justice charged with the supervision of the judicial system and the continuous improvement of the law on consistent and homogenous principles. A catalogue is rarely interesting, but it is frequently most useful, and the reader may glance as quickly as he likes over the following list of States having Ministers of Justice:—Belgium, Denmark, France, Prussia, Italy, the Papal States, the Netherlands, Portugal, Russia, Spain, Sweden, Norway, Saxony, Bavaria, Wurtemburgh, and Baden. Turkey, Brazil, Chili, and Peru have each of them a Minister of Justice; and a department of Justice is comprised in the governmental departments of Canada and British North America. We of the United Kingdom and our congeners of the United States are singular, as we said, in having no department of State corresponding to the Administration of Justice. Looking to this and considering that in the principal, at least, of the States from which we differ in this respect the law is in a condition so far superior to our own that it is codified, while

ours is of unmanageable mass and of infinite intricacy, it seems not too much to say that there is a suggestion, if not a presumption, that had we had a Department of Justice we should have benefited by it.

If the proposal to establish a Ministry of Justice be considered on its merits, it is difficult to see what reasons can be urged against it. Our commerce and manufactures, our pauperism, and even our Post Office, are represented in the Cabinet by special Ministers. The President of the Council is, in a sense, our Minister of Education. Why should we not have a Minister of Law and Justice, the administration of justice being a chief (Mr. Herbert Spencer would persuade us that it is the *sole*) duty of the Government? It may be said, no doubt, that the duties of a Minister of Justice are divided between the Home Secretary and the Attorneys-General in England and Ireland, and the Lord-Advocate in Scotland. But how are they discharged? It is long since we have had a Home Secretary to whom any one would think of assigning the office of Minister of Justice if it existed. On the other hand, the duties proper to a Minister of the Interior might be supposed sufficient in this, as in other countries, for a single person. The Attorney-General and the Lord-Advocate, again, are overworked officials; and, however competent they may be to discharge in their respective divisions of the kingdom the duties of a Minister of Justice, they are rarely free to perform them. "Nothing is more disheartening," said Mr. Grant Duff on this point, "than to see the way in which law reforms, which are acknowledged by all reasonable persons to be necessary, hang fire, because no one except a great lawyer and member of the Government can deal with them, and the official gentleman who answer to this description are so overwhelmed with the mass of private practice that they can only rarely and fitfully give an undivided attention to public affairs. We have often had examples of this in Scotland; but in England it is far worse. The small amount of law reform that the country gets out of its highly paid Attorney-General is only more remarkable than the almost incredible sums which he lives up out of his private practice as a foundation for the peerage to which he usually looks forward as the reward of his toils." Thus the facts are that the Home Secretary, cannot, and the chief law officers of the Crown are rarely free to discharge the duties of a Minister of Justice. These duties are left to the intermittent and desultory efforts of individuals and voluntary associations. The result, of course, is that they are frequently long neglected and rarely well formed. The judicial system is without regular supervision, and receives attention only when its condition evokes popular clamour. The process of improving the general laws of the country goes on at haphazard and very slowly in the intervals of party strifes. There are blots in the law that were pointed

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out in the time of Lord Bacon. We have made little progress in the art of *publishing* law. We have no code and no hope of soon getting one; and even as regards consolidation, we have scarcely passed the point reached in France in the time of Charles VII. Is it possible to disconnect the state of backwardness and the fact that we have never had a special organization for securing progress?

Of course the absence of the organization and the state of the law also may be referred to the genius of our people. Things would have been different had the people felt the want of the former much, or been properly impressed with the intolerableness of the latter. The popular temper in regard to changes in the law may be inferred from the system of rules which Lord Macaulay correctly represented the Legislature to have followed from the age of John to the age of Victoria:—"To think nothing of symmetry and much of convenience; never to remove an anomaly because it is an anomaly; never to innovate except where some grievance is felt; never to innovate except so far as to get rid of the grievance; never to lay down any proposition of wider extent than the particular case for which it is necessary to provide." These rules breathed the spirit of a cautious conservatism. That, at any rate as regards the law, the consequences of these principles having so long been observed are deplorable every one knows who is acquainted with the subject. It is not likely, however, that these rules will be much attended to in future, the disposition to depart from them having yearly of late been acquiring strength under pressure of the inconveniences they have entailed upon us. But if henceforth we are to study symmetry in the law and consistency of principle in its parts, and if we are to give up the system of patching, mending, and bit-by-bit legislation, will not a Minister of Law and Justice become an indispensable auxiliary in the new course? Mr. Grant Duff may be over sanguine in saying we shall have such a Minister soon, but we shall be surprised if there be not soon an effort made to procure one.—*Pall Mall Gazette*.

## NEED A DISTRESS WARRANT GIVEN BY A CORPORATION AGGREGATE BE UNDER THE CORPORATE SEAL?

In the case of *Strong v. Elliot*, which has recently been decided by Mr. Serjeant Petersdorff in the Exeter County Court, and which we report in another column, the question was raised whether a distress warrant given by a corporation aggregate need be under the corporate seal. The decision of the learned serjeant turned upon another point, but he expressed a very decided opinion on the question to which we have alluded. The matter is one of considerable importance to all corporate bodies, and some doubt exists on the

subject. It may, therefore, be well briefly to remind our readers of the present state of the law on the point.

As Serjeant Petersdorff remarked it has now become a common practice not to affix the corporation seal to distress-warrants. Nevertheless until the last few years it was generally understood in the profession that the formality could not safely be omitted, and many of the older practitioners still adhere to the practice. Strangely enough the text-books on the law of landlord and tenant give no information on the subject; even Woodfall preserves a discreet silence. On turning to the authorities we find them somewhat conflicting. Although it was formerly held (see the Year-books, 4 Hen. VII. 6; 13 Hen. VII. 17; 13 Hen. VIII. 12) that a corporation could do no act whatever without deed, it was soon afterwards allowed that in all *ordinary* matters—such as *e. g.*, the appointment of a cook or butler—it might act without seal. The earliest case, however, directly bearing on the present point is that of *Horn v. Ivie*, 1 Vent. 57, 1 Sid. 441, 1 Mod. 18, decided in Michaelmas Term, 20 Car. 2. This was a very peculiar case. Charles II. had granted a patent to the Canary Company which conferred on it the exclusive right of trading to the Canaries, and provided that all other merchants who should bring goods from there should "forfeit such ships and goods" to the company. The plaintiff was alleged by Company to have traded to the Canaries in violation of the patent, and the defendant Ivie had, as the company's bailiff, seized a certain ship and sails belonging to the plaintiff. The defendant by his plea, justified the seizure under the patent but did not allege any authority under the corporate seal. On demurrer the Court of King's Bench held that the appointment of a bailiff by a corporation must be under the corporate seal, and that the plea was bad. Only a few years after this, however, we find the Court of Common Pleas deciding, in the case of *Mauby v. Long*, 3 Lev. 107, that a bailiff who had seized cattle *damages* *feasant* need not allege, in his plea of justification, that his appointment was under the corporate seal. The cases of *Horn v. Ivie* and *Manby v. Long*, therefore, established that, as a general rule, the bailiff of a corporation must be appointed by writing under the corporate seal; but that a bailiff to distrain cattle *damages* *feasant* need not be so appointed. This rule is accordingly laid down in Viner's *Abridg. Tit. Corporation* (B.) 5; where however, it is added that if the corporation have a head an appointment under seal is not necessary. It should be noticed, however, that *Cary v. Matthews*, which we shall presently notice, is the only authority cited in support of the passage. In *The East London Waterworks Company v. Bailey*, 4 Bing. 489, the necessity for an appointment under seal is asserted by Best, C. J., in a considered judgment of the Court of Common Pleas. Moreover, in the last edition of Chitty on Contracts, the judgment in *The*

*East London Waterworks Company v. Bailey* is cited with approval as showing the existing law. Notwithstanding these authorities, however, we have no doubt that both *Horn v. Ivis* and the rule established by it are now overruled. In the first place, as was pointed out in *The Dean and chapter of Windsor's case*, 2 Wms. Saund. 805 a., and in *R. v. Bigg*, 3 P. Wms. 423, the service in *Horn v. Ivis* can hardly be said to have been an ordinary service, and indeed was not in truth a distress at all, but a seizure of forfeited goods. Moreover it is laid down in Bro. Abridg. *Traverse per sans ceo*, pl 8; and is still clear law, that a subsequent ratification by a landlord of a bailiff's authority is as effectual as a previous command, and it is hard to see why this rule should not apply in the case of corporations. Independently of this, too, there are several direct authorities on the other side. The first is a note in 1 Salkeld, 191, in the following words: "A corporation aggregate may appoint a bailiff to distrain without deed or warrant, as well as a cook or butler, for it neither vests nor divests any sort of interest in or out of the corporation: so held inter *Cary v. Mathews* in Cam. Scacc." This case, however, is also reported in 1 Shower, 61, and 3 Mod. 137, and from these reports it would appear that the real question there, as well as in one or two earlier cases, was whether a bailiff of a corporation, who was duly appointed for general purposes, could distrain without a special authority. Perhaps, therefore, neither *Cary v. Mathews*, nor the above cited passage in Viner's Abridg., which depends upon it, can be considered as of any authority on either side of the question. Far more weight, however, is due to a passage in Viner's Abridg. Tit. *Corporations* (K), 25 and 29, where it is said that "He who distrains as bailiff of a corporation, and is not bailiff, may make conusance, &c., if they agree to it, and good without deed; and the case was that one of the corporation had distrained in right of the corporation, and had not their deed." *Though the law is that a bailiff may justify in trespass*, as bailiff to a corporation without a deed, yet it is not like to a bailiff in an assize. *Doe v. Peirce*, 2 Camp. 96, though indirectly bearing on the present question, may be considered as shaking the authority of the old decisions, as it was there held that a verbal notice to quit given by a steward of a corporation was good, without showing his authority. The old rule, however, seems to have received its great blow from the Court of Queen's Bench, in *Smith v. The Birmingham Gas Company*, 1 A. & E. 526. After considering the authorities the Court there held unanimously that a bailiff need not be appointed by writing under the corporate seal. An attempt may indeed be made at some future day to place this case on the narrow basis of the company's Act, the 9th section of which would have quite supported the decision. It is clear, however, from their judgments, that the learned judges

did not decide the case on any such narrow basis, but intended to lay down a broad general rule. Indeed they refused to recognise *Horn v. Ivis* as a general authority, and Lord Denman, C. J., said that it proceeded simply on the ground that the service of the bailiff was not an ordinary one.

On the whole the weight of authority seems very strongly in favour of the view that the corporate seal is not necessary; but at the same time, both corporations and bailiffs will do well to have the corporate seal affixed whenever circumstances will allow this to be done.—*Solicitors' Journal*.

## ONTARIO REPORTS.

### COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law, Reporter to the Court.)

#### TAYLOR V. GRAND TRUNK RAILWAY COMPANY.

*Railway Co.—Service of writ of summons on Station Master.* The station master of a railway company, the head office of which is not within Ontario, is not an agent on whom service of a writ of summons against the company can properly be effected, under C. L. P. Act, sec. 17.

(Chambers, Oct. 13, 1868.)

*Lauder* obtained a summons calling on the plaintiff to show cause why the service of a writ of summons against the defendants, which had been effected on a station master of the company, should not be set aside as irregular, on the ground that the station master was not an agent of the company within the meaning of section 17 of the Common Law Procedure Act, which enacts that "every person who, within Upper Canada, transacts or carries on any of the business of or any business for any corporation whose chief place of business is without the limits of Upper Canada, shall for the purpose of being served with a writ of summons issued against such corporation, be deemed the agent thereof."

*Oster* showed cause, and contended that the words were so wide and general as necessarily to embrace the case of a station master or agent.

MORRISON, J., held that the agent contemplated by the act was in his opinion a general agent, or superintendent, or some other officer of that description; and that the service of the writ on the station master was irregular.

*Summons absolute, without costs.*

#### NEILL V. McLAUGHLIN ET AL.

*Action on administration bond—Breaches—Staying proceedings.*

On an application made to stay proceedings on an administration bond:

*Held*, 1. That no citation is necessary to compel the delivery of an account by an administrator, or to make it necessary for an administrator to collect and pay debts. 2. The want of a decree of distributions is an answer by way of plea to a breach for not distributing. 3. Full damages may be recovered on breach for not administering. *Quare*, if the breach should show receipt and misappropriation of funds; but if declaration defective in that respect, defendants should demur.

Stay of proceedings refused.

Dictum in *Earl of Elgin v. Cross*, 10 U. C. Q. B., 246, doubted and distinguished.

(Chambers, Oct. 19, 1868.)

C. L. Cham.]

THE QUEEN V. MULLADY AND DONOVAN.

[C. L. Cham.]

This was an action by the assignee of an administration bond, on which the plaintiff declared, assigning for breaches, 1st, that the administrator, for whom defendants are sureties, did not well and truly administer; 2nd, that he did not make or cause to be made a just and true account of his administration; 3rd, that he did not deliver and pay over to the person or persons entitled, the rest, residue and remainder of the goods, chattels and credits which remained, and that a large sum of money remained in his hands unpaid and unaccounted for.

*Boswell*, for the defendants, moved to stay proceedings, on an affidavit that no decree of distribution had been obtained against the administrator, and that no citation had been issued out of the Surrogate Court, calling on the administrator to file an inventory or to administer.

He cited *Earl of Elgin v. Cross*, 10 U. C. Q. B. 97 & 256, and cases there referred to, also *Archbishop of Canterbury v. Tupper*, 8 B. & C. 151.

DRAPER, C. J.—*Archbishop of Canterbury v. Wells*, 1 Salk. 115, shows that no citation is necessary to compel the delivery of an account. Still less can it be necessary, in order to make it the duty of the administrator to administer, i.e., to collect assets and pay debts. The condition of the bond is sufficient, and the duty attaches immediately on the taking out administration. The want of a decree is an answer to the breach for not distributing, though it would be a good plea to that breach, and a partial stay of proceedings cannot be granted.

On the breach for not administering full damages may be recovered, *Archbishop of Canterbury v. Robertson*, 1 Crompt. & M. 690. Perhaps the breach should show the receipt and misappropriation of funds, in order to the recovery of full damages; but if the breach as it stands be insufficiently assigned, that is rather ground of demurrer than of staying proceedings.

The dictum of Sir John B. Robinson, in *Earl of Elgin v. Cross*, 10 U. C. Q. B. 246, was not necessary for the decision of that case. It is founded on the case of *The Archbishop of Canterbury v. House*, Cowp. 140, which does not apply to a breach similar to the first breach in this case, where it may be that the administrator has wasted the assets. I have not succeeded in finding any case in which the proceedings on the particular breach have been stayed on the grounds of the want of a decree for distribution, or of a citation for an inventory.

The summons was moved with costs; it must be discharged with costs.

*Summons discharged with costs.*

#### THE QUEEN V. MULLADY AND DONOVAN.

*Application for bail by prisoners committed for murder—Delay in trial.*

On an application by prisoners in custody on a charge of murder, under a coroner's warrant, to be admitted to bail, it is proper to consider the probability of their forfeiting their bail if they know themselves to be guilty. Where in such case there is such a presumption of the guilt of the prisoners as to warrant a grand jury in finding a true bill, they should not be admitted to bail. The fact of one assize having passed over since the commitment of the prisoners, without their having been brought to trial, is in itself no ground for admitting them to bail.

The application is one to discretion, and not of right, the prisoners not having brought themselves within 31 Car. II. cap. 2, sec. 7.

[Chambers, Nov. 18, 1868.]

This was an application to admit the prisoners to bail. It was grounded upon two principal allegations: 1st, that the prisoners were committed on a charge of murder to the common gaol of the county of Huron, before the last assizes for the county of Huron, at which court no indictment was preferred against them; and, 2nd, that upon the depositions which were taken at the coroner's inquest, the case against the prisoners was one of circumstantial evidence only, and amounted to no more than a case of suspicion, which, however strong, would not justify the detention of the prisoners in gaol.

The prisoners were committed in June last, upon a coroner's warrant, founded on an inquest, by which it was declared that they were guilty of wilful murder.

*Gwynne*, Q. C., for the Crown, showed cause. The prisoners are not entitled to bail as of right, unless they bring themselves (which they do not) within 31 Car. II. cap. 2, sec. 7: *Anon.* 1 Vent. 346; *Lord Aylesbury's Case*, 1 Salk. 108; *Reg. v. Barronet*, 1 E. & B. 1, Dears. C. C. 51; *Barthelemy's Case*, 1 E. & B. 8, Dears. C. C. 62.

Nor are they entitled as a matter of discretion; 1st, because in such case they must bring the deposition before the Court, which they do not do, and must establish by the depositions that there was nothing to justify the verdict of the coroner's jury: *Rez v. Mills*, 4 N. & M. 6; 1 Ch. Crim. Law, 98. 2nd, because the Crown now brings those depositions, which establish sufficient to justify the conclusion arrived at by that jury. 3rd, because a sufficient explanation is given on affidavit, on the part of the Crown, that a due regard to the ends of justice demanded that the case should be postponed to the next court, for the purpose of obtaining evidence to supply certain missing links in the chain of circumstantial evidence, and to show why the case was not proceeded with at the late court.

The judge cannot try the case. If there be sufficient to justify the charge being made, so as to put the prisoners on their trial, that is a sufficient reason why bail should be refused. The lapse of an assize can make no difference, except in so far as it may enable the prisoners to take such steps as, under 31 Car. II., would entitle them of right to bail.

*McMichael* contra. 1st. We do not ask bail as a matter of right, but appeal to the discretion of the court: *Reg. v. McCormack*, 17 Ir. C. L. Rep. 411. 2nd. The Crown have allowed an assize to pass since the prosecution, and this entitles us to ask for bail: *Fitzpatrick's Case*, 1 Salk. 108; *Lord Aylesbury*, Ib.; *Lord Maughan's Case*, Ib.; *Reg. v. Wyndham*, 3 Vin. Ab. 515. 3. It does not appear from the depositions that it was a clear case of murder, and therefore a judge has discretion to bail: *O'Brien, J.*, in *Reg. v. McCarthy*, 11 Ir. C. L. Rep. 210 & 226.

DRAPER, C. J.—The prisoners did not pray, on the first day of the assizes, under the Habeas Corpus Act, to be brought to trial, and the Crown was not therefore bound to indict them at that court,

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and therefore they cannot claim to be discharged as of right. The present application is therefore one to discretion; and the fact that one assize has passed over without their being proceeded against, can have no other influence than to induce a somewhat closer examination of the evidence on which the prisoners were committed.

The offence charged involves the lives of the prisoners: and it is not too much to say, that if they are self-convicted of guilt, and have no hope but that the prosecutor may not be able to produce sufficient evidence to satisfy a jury, or that some fortuitous circumstance may save them, they will rather forfeit their bail than their lives. There is a peculiar atrocity attaching to one of the prisoners if he be guilty, which must extinguish any hope that capital punishment will not follow conviction. This consideration must have its proper weight in disposing of the present application.

The inquiry that is of principal importance, then, is, as to the sufficiency of the evidence to establish a case to go to the jury. I certainly am not called upon to express any opinion as to whether the evidence is such that, if believed, it ought to induce the jury to convict. It is going quite far enough to inquire if there be evidence which would sustain a conviction; and I am compelled to say that after going through the depositions, I think they contain a strong *prima facie* case, though one which, if there be additional evidence, I think ought not to have been tried without it, or until proper efforts to procure it have been made and have failed.

I abstain advisedly from going into a particular consideration of the facts which I think bear against the prisoners. I will go no farther than to say that, as they stand, they afford a presumption of guilt, at least so strong that a grand jury would, in my opinion, find a true bill against the accused. Of the fact of murder having been committed, there can, I apprehend, be no doubt; and I go no farther than to say that there is in my judgment sufficient evidence to put them on their trial.

So far as regards the charge, and the evidence supporting it, I think the application should be refused. I have already observed on the probable result, if the prisoners, knowing themselves to be guilty, should be admitted to bail.

## ENGLISH REPORTS.

### CROWN CASES RESERVED.

#### REG. V. CRAB.

*False pretences*—Inducing persons applying for situations to deposit money as a guarantee for honesty—Pretence of carrying on business as a house agent.

The prisoner was convicted for obtaining money by falsely pretending that he carried on an extensive business as a surveyor and house agent, &c.; and the jury found that he carried on no business whatever. *Held*, that the conviction was right.

[C. C. R. 16 W. R., 732, May 16, 1868.]

Case reserved by the Assistant-Judge of the Middlesex Sessions:—

John Augustus Crab was tried before me on the 27th March, 1868, for having obtained various sums of money from several persons by false pretences, with intent to defraud.

The pretences relied upon were, that he was at the time he obtained the moneys, carrying on an extensive business as a surveyor and house agent, and that he had employment for several clerks to collect rents and assist in the conduct of the said business. By these pretences he induced individuals to deposit sums of money with him as a guarantee of their honesty, and it was proved that he was not carrying on an extensive, or any business as a surveyor or house agent, and that he had not any employment for several or any clerks to collect rents, or to assist in the conduct of any business whatever.

The prisoner's counsel declined to address the jury on the facts, and relied on the objection that the above pretences were not in point of law sufficient to sustain a criminal charge. The prisoner was found guilty, and sentence was deferred. He is now in the House of Correction in and for the county of Middlesex, awaiting the decision of this honourable Court upon the above objection.

The question I have to submit to this honourable Court is whether the pretences above set forth are or are not sufficient in point of law to sustain the charge upon which the prisoner was convicted.

[The case as above stated having been called on for argument upon the 25th April, was sent back to the learned judges for amendment, and was now returned by him amended as follows:—]

James Hawkins was induced by an advertisement in the *Times* to see the prisoner, who was found in the occupation of a room in Margaret-street, Cavendish-square, having the appearance of an agency office.

The prisoner said that he was the advertiser, and wanted several clerks to assist in carrying on his business as a surveyor and house agent, that his business was of great extent, and that as the clerks he wished to engage would be entrusted to collect rents to a large amount, he should require the sum of £25 to be deposited with him by each as a security for his honesty.

In consequence of these pretences James Hawkins was induced to hand £25 to the prisoner.

James Cirmichael was induced by the same pretences to give the prisoner £10, and several other witnesses proved that they were about to deposit money with the prisoner under similar circumstances, but that they were prevented doing so by the interference of the police.

It was proved to the satisfaction of the jury that the prisoner was not carrying on the business of a surveyor or house agent; that he had not employment in such trades for any clerks, and that the prisoner's office was open for the sole purpose of defrauding persons invited to it by the advertisement published by the prisoner.

The prisoner's counsel contended that the pretences used were only exaggerated representations of the extent of his business, but as the jury found that he was not carrying on any business whatever I thought the pretences were such as would support the charge against him.

M. Williams, for the prisoner, said that in a case similar to the present, tried before Byes J., at the last Kingston Assizes, his Lordship had said that a false representation by a man of his

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doing a good business was ground for a civil action, but not for indictment, as it was a question merely of degree. [SMITH J.—But here the learned judge reports that the prisoner was carrying on no business whatever, and, therefore, no such question arises.]

Besley, for the prosecution, was not called on; but stated that in the case referred to, before Byles, J., there was evidence that business to some extent was in fact carried on.

KELLY, C. B.—I do not think the objection can be maintained. In order to support this indictment there must be a pretence of an existing fact. It must appear that the party defrauded has been induced to part with his money by the pretence, and the pretence must be untrue. There is all that here. The jury find that he was not carrying on any business whatever.

*Conviction affirmed.*

### QUEEN'S BENCH.

#### KETTLEWELL v. DYSON.

*Common Law Procedure Act, 1854 (17 & 18 Vic. cap. 121, sec. 51)—Interrogatories—Grounds for not answering—Action of ejectment.*

A plaintiff in ejectment is bound to answer an interrogatory in which a defendant who is in possession asks him to state through what links he (plaintiff) traces his claim as heir-at-law; and therefore where A. and B. claimed in an action of ejectment, brought by the former against the latter, certain premises, each alleging that he was the heir-at-law of C., deceased, but A. claimed through a maternal, and B. through a paternal, ancestor; a judge at chambers having made an order calling on A. to answer the following interrogatory—"If you claim as heir-at-law to C., through what links do you trace?"

Held, on motion to rescind the order, that A. (the plaintiff) was bound to answer this interrogatory, though it appeared that the judge who made the order had declined, on the application of A., to make an order on B., the defendant, to answer a similar interrogatory.

[Q. B., 16 W. R. 851, April 18, 1868.]

This was a motion to set aside or rescind an order made by Willes, J., at chambers, calling on the plaintiff in an action of ejectment to answer the following interrogatory—"If you claim as heir-at-law to Sarah Kettlewell, through what links do you trace?" The order after directing the plaintiff to answer this interrogatory, concluded thus—"or give particulars of how you claim at your election." The plaintiff and defendant both claimed certain premises, of which the latter was in possession. Each claimed as heir-at-law, the plaintiff through a maternal and the defendant through a paternal ancestor. The plaintiff had previously applied to the same judge to order the defendant to answer a similar interrogatory, but he refused to make it.

Anderson now moved to rescind the order. You cannot obtain discovery on a matter which is the case of the other side. The right of the defendant to administer such an interrogatory depends on the case of *Flitcroft v. Fletcher*, 11 Ex. 543, and that case has not been approved of in some cases which followed it. In *Pearson v. Turner*, 16 C. B. N. S. 157, 12 W. R. 801, it was held by Erle, C. J., and Willes, J., that a defendant was not entitled to administer such an interrogatory to the plaintiff, except under special circumstances, as where the defendant has been a long time in possession, and knows nothing of the nature of the plaintiff's claim.

The case of *Stoat v. Rew*, 14 C. B. N. S. 209, 11 W. R. 295, is to the same effect. Again, it is laid down in *Moor v. Roberts*, 5 W. R. 693 that the defendant cannot interrogate the plaintiff on the plaintiff's case, or *vice versa*.

I submit it would be very hard if the plaintiff should be compellable to answer this interrogatory, while the plaintiff is not entitled to have a similar question answered by the defendant. [COCKBURN, C. J.—We must at present confine our attention to the order which is before us. Besides, there is a very great difference between administering interrogatories to a person in possession whom another seeks to oust, and administering them to the person who thus seeks to oust him.] LUSH, J.—I think the distinction between the two cases was drawn in *Horton v. Bott*, 5 W. R. 792, 26 L. J. Ex. 267, where it has been held that a plaintiff in ejectment cannot interrogate the defendant as to his title, though the defendant may interrogate the plaintiff.] I submit that the case of *Flitcroft v. Fletcher* (*ubi sup.*) after the other cases cited, cannot be safely followed. He also cited Chitty's Forms, 9th ed. p. 165, note; Cole on Ejectment, 204.

COCKBURN, C. J.—I think, independently of the Common Law Procedure Act, 1854, the Court may order particulars of claim to be furnished in a case like the present. We think that *Flitcroft v. Fletcher* (*ubi sup.*) is a very sound and salutary decision, and we must refuse the rule.

### LORD v. LEE.

*Award—Power to enlarge time—Common Law Procedure Act, 1854 (17 & 18 Vic. cap. 125) sec. 15.*

The Court or a judge has power under the Common Law Procedure Act, 1854, to enlarge the time for making an award, although the arbitrator has actually made his award after the time originally limited, and before the application to enlarge, and the effect of such enlargement is to give validity to the award already made.

[Q. B., 16 W. R. 356, April 27, 1868.]

This was an action on an award tried before Mellor, J., at the sittings in Middlessex, after Trinity Term, 1867.

At the trial of the cause it appeared that an agreement to refer certain matters in dispute between the plaintiff and the defendant was made on the 8th of August, 1866. No time was mentioned in the submission for making the award, and on the 17th of January, 1867, the arbitrator gave notice that it was prepared. On the 27th of February, 1867, the submission was made a rule of Court.

The Common Law Procedure Act, 1854 (17 & 18 Vic. cap. 125) sec. 15, enacted that the arbitrator, acting under any such document [*i.e.* any document authorizing a reference to arbitration, or compulsory order or reference, or under any order referring the award back] shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party; but the parties may, by consent in writing, enlarge the time for making the award; and it shall be lawful for the superior Court, of which such submission, document, or order is or may be made a rule or order, or for any judge thereof,



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for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award, and if no period be stated for the enlargement in such consent, or order for enlargement, it shall be deemed to be an enlargement for one month.

On the 11th of March a judge's order was obtained, enlarging the time for making the award until the 15th of the same month, so as to include the time at which the award was made after the expiration of the three months limited by the statute.

The award was taken up by the petitioner within the enlarged time, and this action having been brought, the petitioner recovered judgment.

A rule nisi to enter the verdict for the defendant having been moved for and obtained.

*Denman, Q.C., and Willoughby*, showed cause, and argued that the statute gave power to enlarge the time for making the award after the term originally limited had expired, and that the award was therefore good. The same course had been taken before the Common Law Procedure Act, under 3 & 4 Will. 4, cap. 42, sec. 39. They referred also to *Re Burton*, 6 W. R. 556, and to *Ward v. The Secretary of State for the War Department*, 11 W. R. 88, 32 L. J. Q. B. 53.

*M. Chambers Q.C., Joyce, and Bush Cooper*, in support of the rule, argued that the arbitrator had exhausted all his powers, and that consequently the enlargement was not within the statute. The award was a nullity, because the time had expired. They referred to *Reid v. Fryatt*, 1 M. & S. 1, and *Mason v. Wallis*, 10 B. & C. 107.

BLACKBURN, J.—I have no doubt on this point that the true construction is that a judge may enlarge the time for making an award, that is, make an order giving extra time, as if it had been in the original submission, and if so any step taken by the arbitrator in the meanwhile would be valid. An arbitrator originally was appointed by the parties to determine the matters referred to him, but his authority, on the ground that the appointment was a personal submission, was revoked by the death or at the will of either of the parties. Now at common law, where an act has been professed to be done by authority, but has not been in fact so done, the person supposed to have given the authority may at any time ratify the act done, and then the ratification gives to the act the same effect as an original authority. Thus where authority is given to an arbitrator to act within a certain time, and he acts after the expiration of the time, he does so as if he had authority, but in reality without it. Then if the parties afterwards agree to waive the objection, that amounts to a ratification of all that has been done in the interval, and an enlarged authority is substituted for the previous one. Various statutes were passed to remedy this state of things, and various enactments as to what should amount to ratification. Then by 3 & 4 Wm. 4, cap. 42, it is provided that the authority of an arbitrator shall not be revocable by any party to the reference, without leave of the Court or a judge, and it also gives authority to the Court or a judge to enlarge from time to time the term for an arbitrator making his award.

The Common Law Procedure Act gives power to parties themselves to agree to enlarge the

term for making an award, and the effect is the same as to the parol ratification at common law in affecting an alteration in the original submission, which has then to be read as though the whole time originally named and subsequently added had formed part of it. The statute further says that the Court or a judge shall have the same power as parties themselves have, and as this award, made after the expiration of the original time, purports to be made by authority of the submission, and was made within the time arrived at by incorporating the new term with that originally named, the effect of the order is to make it a ratification of all that had been done, just as if the original submission had been for the whole time so enlarged. In *Mason v. Wallis* the enlargement was a nullity, and *Reid v. Fryatt* is not an authority adverse to the opinion I am now expressing, as the Court had no occasion to express an opinion. Then in the two late decisions the Court refused to interfere without deciding on this point, while it appears that the leaning of their opinion was strongly in favour of construing the Act as we are now doing. The weight of authority coincides, therefore, with the opinion at which I have arrived, that this award is valid, and the plaintiff in consequence ought to keep his verdict.

MELLOR and LUSH, JJ., concurred.

Rule discharged.

#### WATKIN V. HALL

*Defamation—Rumour—Justification—Inuendo—Common Law Procedure Act, 1853, sec. 61—Demurrer.*

To an action for slander the defendant pleaded that in speaking the words he meant, and was understood to mean, that there was a rumour current to the effect of the words used, and that such a rumour was actually current.

*Held*, that the existence of the rumour was no justification, and that the plea was bad.

[Q. B., 16 W. R., 357, April 28, 1868.]

Declaration.—That the plaintiff was the chairman and a director of a railway company, established by Act of Parliament, to wit the South Eastern Railway Company, for reward and salary to the plaintiff in that behalf; and was also the chairman and a director of a certain other railway company, established by Act of Parliament, to wit the Manchester, Sheffield and Lincolnshire Railway Company, also for reward and salary for him in that behalf; and then was also the chairman and a director of the Grand Trunk of Canada Railway, also for reward and salary to him in that behalf; and was a holder and proprietor of a large quantity of shares of great value, and was otherwise interested in the said several companies, and the concerns and affairs thereof respectively, and in the welfare and prosperity thereof respectively, and devoted and gave much of his time and attention to the management and business of the said several companies respectively, and greatly occupied himself therewith, and thereby acquired great gains. And the plaintiff further saith, that shortly before the committing of the grievances hereinafter mentioned, a fall in the market value of the shares in the said South-Eastern Railway Company had occurred and taken place. And the defendant falsely and maliciously spoke and published of and concerning the plaintiff, and of

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and concerning him as such chairman and director of the said South-Eastern Railway Company, and of and concerning him in his connection with the said company, and of his position therein, and of and concerning the said fall in the market value of and concerning the said shares in the said South-Eastern Railway Company, and of and concerning a rumour assumed by the defendant to have existed and been circulated respecting the plaintiff, and respecting his pecuniary position and solvency, and of and concerning the premises, the words following, that is to say, "You have heard what has caused the fall," meaning thereby the said fall in the market value of the said shares in the said South-Eastern Railway Company. "I," meaning the defendant, "mean the rumour about the South-Eastern chairman having failed," meaning thereby that the plaintiff so being such chairman of the said South-Eastern Railway Company had become embarrassed in his pecuniary affairs, and had become and was insolvent. The declaration then alleged special damage.

Plea.—That in speaking the said words in the declaration mentioned the defendant meant, and was understood by the bystanders to mean, that there had been, and there was, a rumour current in the Stock Exchange about the chairman of the South-Eastern Railway Company having failed, and not that the plaintiff had become embarrassed, and had become and was insolvent, as in the innuendo in that behalf in the declaration alleged. And the defendant further says that it was and is true that there had been and then was a rumour current in the Stock Exchange about the said chairman of the South-Eastern Railway Company having failed.

Demurrer on the ground that the existence of a rumour did not justify the repetition of the slander.

Joinder in demurrer.

*Beasley*, in support of demurrer, was stopped.

*Holl*, contra, cited *Lake v. King*, 1 Wm. Saunders, 180, n. 1; *McPherson v. Daniels*, 10 B. & C. 263; *Bremridge v. Latimer*, 12 W. R. 878.

BLACKBURN, J.—The only real question here is whether an action will lie for stating, without the existence of any reason that makes the communication privileged, that there is rumour existing that the plaintiff, a trader, was in insolvent circumstances, and whether it would be a justification for the defendant to show that he was merely repeating a rumour which was actually current, without giving on his own part any opinion as to its truth or falsity. The rule I understand to be that where the words spoken are such as might be injurious to your neighbour, and are followed by actual injury to him, or are of such a nature that the law will imply damage as a necessary consequence (as in the case of words spoken of a man in his trade); then in such cases the law implies malice in the speaker. But when there is a justification for uttering the words, that *prima facie*, negatives malice, and in such case, express malice must be proved. The question then is, whether in this case where there is clearly no question of privilege, and in which the law implies malice, it is any answer to say that there was a rumour, and that the defendant only repeated the words as a rumour. I cannot use better words to express the principle

that governs the case than those of Littledale, J. He says, "It is competent to a defendant upon the general issue to show that the words were not spoken maliciously, by proving that they were spoken on an occasion or under circumstances which the law, on ground of public policy allows, as in the course of a parliamentary or judicial proceeding, or giving the character of a servant. But if the defendant relies upon the truth as an answer to the action he must plead that matter specially, because the truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter, though true, and thereby subject himself to an indictment); but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess. Now, a defendant, by showing that he stated, at the time when he published slanderous matter of the plaintiff, that he heard it from a third person, does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion. Such a plea does not show that the slander was published on an occasion or under circumstances which the law, on grounds of public policy, allows. Nor does it show that the plaintiff has not sustained, or is not entitled in a court of law to recover damages. As great an injury may accrue from the wrongful repetition as from the first publication of slander, the first utterer of which may have been insane, or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a court of law for injurious matter published concerning him, because another person previously published it. That shows, not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover damages in a court of law, but that he has been wronged by another person as well as the defendant, and may, consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person as well as the defendant."

I adopt these words, used in *McPherson v. Daniels*, as expressing accurately my view. The fact that other people had spread the report before it was repeated by the defendant, does not disentitle the plaintiff from recovering damages for the unlawful repetition and spreading of such a report, that must, in the nature of things, be injurious to a man in his trade. Then, as to the argument that, looking at the innuendo, the plea amounts to the general issue, and that the latter part of it may be rejected as surplusage, before the alteration in the law the innuendo must have been proved as laid when supported by prefatory matter, and, when not so supported, the prefatory matter might be rejected. This the Legislature considered to be injurious, and they have ordered that "in actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment, to show how such words or matter were used in the

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sense, and such averment shall be put in issue by the denial of the alleged libel or slander." Now every innuendo must be good in itself and none can be rejected because unsupported by prefatory matter. Then the statute continues, that where the words or matter set forth with or without the alleged meaning show a cause of action, the declaration shall be sufficient, this must mean that where there is an innuendo, the count containing it shall be to all intents and purposes two counts, one with, the other without, the innuendo. The case referred to in 12 W. R. was decided rightly enough, because there, when you look to the whole context, the plea amounted to the defendant setting up a different libel, and then pleading not guilty to that and this was rightly held to be embarrassing, but the case does not apply here.

LUSH, J.—I am of the same opinion. The defendant admits that he used these words, and says in effect, I am not responsible, because there was a rumour to that effect which came to me, and which I repeated without saying anything as to its truth. This amounts to the broad assertion that a person may justify giving currency to that which injures the character of another because he did not originate the report, but heard it from some third person, and merely repeated it without giving an opinion as to its truth. This manifestly cannot be supported. As to the other point the argument for the defendant would neutralize the 61st section of the Common Law Procedure Act 1852, because the words used here were actionable in themselves, whether the precise meaning attached to the innuendo is borne out or not.

#### *Judgment for the plaintiff.*

### COMMON PLEAS.

#### TOMPKINS V. BEARD.

*County Court Acts, 19 & 20 Vict. c. 108, sec. 26—Order to try in County Court.*

An order to try in the County Court made under the 19 & 20 Vict. c. 108, sec. 26, will not be rescinded or the subsequent proceedings set aside, on the ground, that it was made before issue joined, where the cause has been tried in the County Court, and both parties have appeared at the trial without objecting to the validity of the order or to the case being heard.

[C. P., 16 W. R., 729, May 6, 1868.]

Davin moved for an order calling on the plaintiff to show cause why an order of the master directing this cause to be tried in the County Court should not be rescinded, and all subsequent proceedings in the cause be set aside.

It appeared that before any declaration was delivered in the action the plaintiff took out a summons before the master to have the cause tried in the County Court. The defendant opposed the application on the ground that the case was not one in which such an order ought to be made, but no objection was then taken to the master's jurisdiction to make such an order before issue joined. The order was made and the case tried before the County Court judge of Berkshire. The defendant appeared at the trial by attorney, but no objection was raised as to the validity of the order or to the trial proceeding, and the plaintiff had a verdict.

By the 19 & 20 Vict. c. 108, sec. 26, it is

enacted that "where in any action of contract brought in any superior court the claim endorsed on the writ does not exceed £50, a judge of a superior court, on the application of either party after issue joined, may in his discretion order that the cause may be tried in any County Court which he shall name."

The 30 & 31 Vict. c. 68, with the rules made under it, extends this power to the master.

In support of the rule it was contended that as the order was made before issue joined it was bad, and the whole of the subsequent proceedings irregular.

BOVILL, C. J.—There are no sufficient grounds for this application. The act gives authority to the master to make the order after issue joined, but at the time this order was made both parties were before the master, and both knew that issue had not been joined. They discussed whether the case was fit to go to the County Court, but no such objection as this was taken, and therefore the order must be taken to have been made with the implied consent of the defendant. The defendant might have afterwards applied to have the order rescinded, but he did not: he appeared at the trial and took his chance of a verdict. He is now far too late, and is concluded by having acted under the order without protest.

The other judges concurred.

*Rule refused.*

#### PELL V. LINNELL AND OTHERS.\*

*Not proceeding to trial—Costs of day.*

After notice of trial had been given one of several defendants died. The plaintiff did not countermand his notice, or proceed to trial.

Held, that as no suggestion of the death had been entered, the surviving defendants were not entitled to their costs of the day.

[C. P., 16 W. R., 704, May, 1868.]

This was an action brought by the plaintiff against Linnell and two co-defendants.

Notice of trial was given for the Bristol Summer Assizes, the commission day of which was the 13th of August. After such notice had been given, Beasley, one of the defendants, died. Notice of countermand was given on the afternoon of the 12th, which was admitted to be too late.

The defendants went to Bristol with their witnesses, and the plaintiff not having appeared or set down the cause for trial, afterwards obtained the usual side bar rule for the costs of the day. The master refused to tax the costs, on the ground that as no suggestion of Beasley's death had been entered, the plaintiff had made no default in not proceeding to trial.

FIGOTT, B., having made an order that the defendant's cost should be taxed under the rule,

C. Russell had obtained a rule, calling on the defendants to show cause why the order should not be set aside.

Henry James now showed cause. The defendants are entitled to their costs, as it was impossible for them to tell that the plaintiff would not enter the suggestion (which might be done at any moment) and proceed to trial. [BOVILL, C. J.—To entitle yourself to these costs, you must show

\* Before Bovill, C. J., and Byles, J.

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PELL V. LINNELL AND OTHERS.—BRADY V. PICKERING.

[Irish Rep.]

that the plaintiff made default in going to trial; whereas his default, if any, was not in entering the suggestion, for until it was entered, the cause could not proceed.] But it might have been entered at any time without notice to the defendants. [BOVILL, C. J.—Surely it is traversable.] The 136th section of the Common Law Procedure Act, 1852, enacts that the action shall not be abated. [BYLES, J.—Yes, but it is suspended until the suggestion is entered. It may be that the defendant who died was the substantial defendant, and that the others were merely joined for conformity. Is not the plaintiff to have the opportunity of considering whether it is worth while to proceed?] [BOVILL, C. J., referred to *Pinkus v. Sturch*, 6 C.B. 474.]

C. Russell, in support of the rule, referred to *Barnewall v. Sutherland*, 19 L. J. C. P. 291; *Mullings v. —*, 5 Taunt. 88; Day's Common Law Procedure Act, 3rd ed. pp. 90 and 116.

BOVILL, C.J.—It seems to me that the defendants are not entitled to their costs. I assume that the countermand of notice of trial was too late, but the mere absence of such countermand does not give the defendants a right to the costs of the day. The 99th section of the C. L. P. Act, 1852, does not give the costs of the day; it only shows the mode of proceeding to obtain those costs, which are regulated by the former practice. The plaintiff was always at liberty to show any good excuse for not going to trial. Here the cause, though not abated, was suspended, and no trial could take place till the suggestion was entered. The cases establish that if the trial takes place without such a suggestion, and a witness is prosecuted for perjury, he would not be responsible (*R v. Cohen*, 1 Stark. 511), showing that the whole proceeding would be a nullity. Mr. James assumed that it was the imperative duty of the defendant to make the suggestion, but there is no authority for that, and the defendants might equally, if they desired to have the record complete, suggested the death. But neither party chose to enter it, and so the cause could not be tried by reason of the death, that is, by reason of the act of God. Suppose, however, it were the duty of the plaintiff to have entered it, it does not follow that the defendants are entitled to their costs of the day. If the plaintiff has any reasonable excuse for not proceeding to trial, the costs of the day need not be given. The absence of a material witness has been held such an excuse (*Eastern Union v. Symonds*, 4 Ex. 502), and surely, then, the death of one of the parties to the action may be so considered. The death here took place shortly before the trial, and I do not think there is any default on the part of the plaintiff, or anything entitling the defendants to their costs of the day. Mr. James must contend that the plaintiff would be bound to enter the suggestion if the death took place upon the commission day itself.

BYLES, J.—I am of the same opinion. At common law this action would have abated, and the costs on both sides been thrown away. In the present state of the law the action is not abated, but it is suspended by the act of God and the act of the law, unless one or other party enter a suggestion, which neither of them did here.

*Rule absolute.*

## IRISH REPORTS.

### BRADY V. PICKERING.

*Practice—Pleading—Extension of time to plead—Construction of order.*

A defendant having, two days before the ordinary time for pleading had expired, obtained an order granting him a week further time to plead.

*Held*, upon motion to set aside judgment for having been marked before the time for pleading had expired, that the further time to plead was to be computed from the expiration of the ordinary time for pleading, and not from the date of the order.

[C. P. (Ir.) 16 W. R. 730, Apr. 20, 1868.]

This was an application on behalf of the defendant that the judgment in this case might be set aside, on the ground of its having been marked before the time for pleading had expired. The summons and plaint was served upon the defendant on the 27th of February, and the ordinary time for pleading thereto would have expired on the 12th of March following; but two days previous to the latter date, namely on the 10th of March, the defendant applied to Mr. Justice O'Hagan for an extension of time for pleading, and obtained an order in the following terms:—"On motion of Mr. Keogh, the counsel for defendant, it is ordered by the Right Honorable Mr. Justice O'Hagan, that the defendant do have a week further time to plead, undertaking to take short notice of trial, if necessary." This order was dated the 10th of March, and a copy of it was, on the 12th of March following, served upon the attorney for the defendant. Notwithstanding this, the plaintiff caused judgment by default to be marked on the 18th of March, and on the next day issued a notice of inquiry before the Master of the Court to assess damages.

*P. Keogh*, for the motion, relied upon the order of the 10th of March, as having given the defendant a week to plead from the day on which the ordinary time for pleading would expire.

*J. A. Byrne* and *E. M. Kelly*, *contra*, contended that the order was to be taken as giving a week's time from the date of the order; and relied upon 1 Lush Prac. 445, 3rd edit.

*Per CUBIAM*.—The construction contended for by the defendant seems the most reasonable. The judgment must be set aside on payment by the defendant of the costs incurred in marking judgment.

## GENERAL CORRESPONDENCE.

### *Unprofessional business.*

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Will you be good enough to explain to me to what branch of our learned profession "Lehigh Egg Coal" belongs. I have searched in vain all works on real and personal property, special pleading, and conveyancing, to which I have access. And yet from day to day I see an advertisement signed by gentlemen describing themselves as "Bar-risters, &c.," wherein it is announced that they have for sale "a quantity of Lehigh Egg Coal on reasonable terms." To what part of

## GENERAL CORRESPONDENCE.

a barrister's vocation does the "sale of Lehigh Egg Coal" belong? I find that the word egg (Sax. *æg*. G. and D. *ei* Dou. *eg* Qu. L. *ovum* by a change of *g* into *e*) is a "body formed in the body of the females of fowls and certain other animals, containing an embryo or fetus of the same species, or the substance from which a like animal is produced." But as applied to coal, I can find no description of the word in any law book of authority that I possess. Supposing, however, that "Egg Coal" means coal that is produced from eggs, *i. e.*, from a body formed in the body of females, &c., I am utterly at a loss to understand the meaning of the word "Lehigh" as applied to "Egg Coal" thus defined and thus understood. *Le*, *Lea*, or *Lay* (Sax. *legþ* or *ley*), means, I find, a meadow or plain. This being so, "Lehigh" must, I take it, mean a high meadow or plain, and so have reference to locality of some kind. Hence we have it that "Le high Egg Coal" is coal produced from an egg on a high meadow or plain. But this, as connected with the profession of an advocate, is not satisfactory to my mind. It appears to me, on further consideration, that the prefix *Le* (Sax. *legþ* or *ley*) must mean Law (*vide* *Termes de la Ley*). Still I yet find it difficult to connect the words "Egg Coal" with the word *Le* or *Ley* in the latter sense. It must be that this business (sale of Lehigh Egg Coal) is not intended to be denoted by the word "Barristers" at the foot of the advertisement, but by the "&c." which follows the word "Barristers." And if so, the word "Barristers" had better be dropped from such an advertisement. Can you assist me? If so, any assistance will be thankfully received by your anxious correspondent.

ENQUIRER.

Toronto, Dec. 17, 1868.

[We really cannot assist our correspondent, but hope that the gentlemen whose advertisement has caused him so much trouble will give him some light. It seems to us that our correspondent is "heaping coals of fire" on their heads.—Eds. L. J.]

*Quashing conviction—Chairman and Justices at Quarter Sess.—Their respective positions.*

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—At a late Court of Quarter Sessions, an application was made to quash a conviction made by two Justices of the Peace

against A, for obstructing B when performing labour on the highway. A made an affidavit of the fact of his being convicted, and also swore that the Justices had no jurisdiction. The notice of appeal appeared to have been regularly served. No record of the conviction was returned by the convicting Justices, neither did they or the complainant appear.

On this affidavit of the appellant, the court, against the opinion of the chairman, quashed the conviction and ordered the complainant to pay costs.

It is the first instance that I am aware of in which a court has, on affidavit, quashed a conviction, when neither the record or a copy of it was before the Justices.

The complainant had no power to compel the Justices to return the record of conviction, neither had the Court of Quarter Sessions; yet the Justices assumed the power to compel the complainant to pay the costs of the appeal.

The best of the joke is that when the notice of appeal was served, the convicting Justices became alarmed and gave a written notice to A that the conviction had been abandoned and would not be acted upon, and this previous to his attending the court.

Since the sitting of the court, the convicting Justices have been into town to the County Attorney, to see if the order for the payment of the costs could not be set aside, and they were told that they must apply to the Court of Queen's Bench in Term. Please insert this with your comments thereon.

Yours, J. P.

January 1, 1869.

[We think the Justices acted without authority in quashing this conviction. There was nothing before them to quash, the conviction, not having been returned to the Sessions. There is another view of the case, which it is important to notice, assuming that the County Judge was the acting chairman, and it is this: if the Justices set at naught the opinion of the chairman upon a point of law, their conduct was most presumptuous. It is simply absurd for magistrates to set up their opinion in matters of law against that of the County Judge; and if the law gives them power to pronounce on questions with which, such as this, they are in all probability profoundly ignorant, it is time some change were made to prevent the recurrence of such acts.]—Eds. L. J.

## GENERAL CORRESPONDENCE.—REVIEWS.

*Attorneys' Fees in Division Courts.*

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I see in the last *Law Journal*, under the head of "General Correspondence," and over the signature of "An Attorney," a letter tending to bring into disrepute one of the most popular, and deservedly so, young Judges in Ontario, considering his age and experience. Since he has been appointed to the Bench he has become beloved and esteemed by the people of his County generally. No person can be more conversant with the case referred to than your subscriber. One of the complaints mentioned in "Attorney's" letter was an action brought by the bailiff of the Second Division Court of a County near Toronto, on the grounds of a breach of covenant on a bond. A jury was called by the plaintiff. It appears that an agreement was made with "Attorney" by defendant's brother to defend the suit. The brother swore at the trial that he agreed with "Attorney" for six dollars to carry the case through and win it; that "Attorney" got a note for the six dollars, and that the note was paid. The case referred to was left to arbitration at the request of defendant's attorney, and the award was given in favour of the plaintiff. The attorney at once applied for a new trial, and supported the application for a new trial by his own affidavit, and before the day of hearing it appears he saw the defendant, and got something like a written retainer to attend the hearing, although by the evidence of the defendant's brother it was originally agreed that "Attorney" was to carry the suit through and win it for the six dollars. The Judge gave the defendant a new trial on paying the costs of the day into Court. The defendants were present at the hearing, and afterwards settled the award with the plaintiff, together with all costs. Hence the trial for costs referred to. The Judge, after patiently hearing the case through, and, contrary to the defence set up, that the attorney had agreed to carry the case through for six dollars, and that he was entitled to no more, came to the conclusion that the retainer was a new contract, and gave his judgment, as "Attorney" says, for six dollars. By giving the above an insertion in the next *Law Journal* you will oblige,

Yours, &amp;c.,

J. T.

January 1st, 1869.

## REVIEWS.

THE LONDON QUARTERLY—THE EDINBURGH REVIEW—THE WESTMINSTER REVIEW—THE NORTH BRITISH REVIEW AND BLACKWOODS MAGAZINE. The Leonard Scott Publishing Company, 140 Fulton Street, New York.

In other columns we publish an advertisement showing the terms on which these Reviews or any of them can be had from the New York Publishers. No educated man, and no man who takes any interest in the world of thought should be without these Reviews. The price at which they are offered by the Leonard Scott Publishing Company, places them within the reach of all. In Politics the Whigs lean on the *Edinburgh Review*. The *London Quarterly* is the organ of moderate Conservatives. The *Westminster* is the organ of Liberalism both in Church and State. The *North British* which is Whig in Politics, was for many years the organ of the Scottish Free Church. *Blackwoods Magazine* equals the more sedate quarterlies in its Literary and Scientific Departments. But the chief attractions of *Blackwood* are the clever papers that from time to time appear on its pages, from the pens of well known authors whose productions afterwards appear in book form. Bulwer and Mrs. Oliphant have written much of late in its pages. Lever, up to the time of his death was also a frequent contributor. The influence of the Reviews is world wide. Thought is not the product of any one nation, and mind speaks to mind in all parts of the world through the pages of these Reviews.

THE STATUTES AND ORDERS relating to the practice and jurisdiction of the Court of Chancery and of the Court of Error and Appeal, with notes, by THOMAS WARDLAW TAYLOR, M.A., &c. Third Edition. Toronto: Adam, Stevenson & Co., Law Publishers, 1868.

This book is one of the most complete things of its kind that has been issued from the press. It contains a large fund of information on the various subjects that are of daily occurrence in a Solicitor's office; comprising in addition to the new orders all the sections of the following acts which affect chancery practice, i. e., the acts providing for the Court of Chancery and proceedings therein, Surrogate deserving of attention in these acts are discussed and cases decided on different sections are referred to in their proper places. This comprises Part I.

Part II., contains the most important part of the work and that most fully annotated, viz.: the orders in chancery, as lately consolidated—principally by the labours of Mr. Taylor himself, who is, therefore, the person most likely to be successful in imparting information to others as to the effect and the proper interpretation to be given to these orders.

## REVIEWS—HORACE GREELEY—NEWSPAPER DIRECTORY.

These notes are much more full than in his last edition and the number of English cases referred to—but not merely strung together by an apparent similarity of subject, as is too often the case with less laborious and painstaking men than Mr. Taylor—shew that he has spared no labour to make the book as complete as is possible otherwise than by an elaborate treatise on chancery practice. All the cases in our own Courts touching on the matters treated of appear to be appropriately worked in.

In the appendix are given the Error and Appeal Acts, and the orders of that Court of the 13th July, 1850. Speaking of this calls to mind the necessity for a speedy remodeling of these rules. It is to be hoped the President of the Court will be able to direct his attention to this at an early day.

Then comes an appendix of forms over and above those given in the consolidated orders. There are some thirty-eight of these, which may be considered as of a semi-official nature, whether we look upon them as having been prepared by the Secretary, or as having been settled in the course of practice.

A table of the abrogated orders, shewing the consolidated orders into which they are now incorporated is prefixed to the edition. This table is interesting, besides its practical usefulness, in shewing the extent to which the orders of the Court have been from time to time altered, re-altered, amended, and re-amended. It would appear from this table that since 8th June, 1853, there have been twenty-nine different sets of orders passed—small chance there was, therefore, to expect any settled practice in the Court of Chancery with such shifting sands to build upon. If things are let alone for a few years it may be hoped that upon the present foundation, a superstructure will arise which will be no discredit to the administration of Equity in this Province. The ever varying phases of business especially incident to a young country, and which operate so much more quickly upon procedure in Courts of Equity than at Common Law, will render changes in the mode of conducting the business of the Courts necessary from time to time, but there may be too much of a good thing, even of chancery orders.

Such a work as that before us, will very materially help to settle and give solidity to Courts, Arrest and imprisonment for debt, Solicitors, Religious institutions, Custody of infants, Foreign affidavits, Law stamps, Quiet-ting titles, Property and trusts, &c. Points the practice, and carry out the object intended to be gained by the consolidation of the orders.

We wish Mr. Taylor every success with this his third and best edition, and hope it may be as remunerative as other law books and publications in this country, *ought* to be—but are not.

No Solicitor's office can afford to be without it, and we doubt not the sale will be large and rapid. The price is, we believe \$5.

## APPOINTMENTS TO OFFICE.

## LIEUTENANT GOVERNORS.

THE HON. WILLIAM PEARCE HOWLAND, C. B., to be Lieutenant Governor of the Province of Ontario. (Gazetted July 18, 1868.)

THE HON. LEMUEL ALLEN WILMOT, to be Lieutenant Governor of the Province of New Brunswick. (Gazetted July 18, 1868.)

## JUDGES.

THE HON. WILLIAM HENRY DRAPER, C. B., late Chief Justice of Upper Canada, to be the Presiding Judge of the Court of Error and Appeal for Upper Canada, now the Province of Ontario. (Gazetted October 31, 1868.)

THE HON. WILLIAM BUELL RICHARDS, late Chief Justice of the Court of Common Pleas for Upper Canada, to be Chief Justice of Upper Canada in the room of the Hon. William Henry Draper, C. B. (Gazetted Nov. 21, 1868.)

THE HON. JOHN HAWKINS HAGARTY, late a Puisne Judge of Her Majesty's Court of Queen's Bench for Upper Canada, to be Justice of the Court of Common Pleas for Upper Canada, in the room of the Hon. William Buell Richards. (Gazetted November 21, 1868.)

THE HON. ADAM WILSON, late a Puisne Judge of the Court of Common Pleas for Upper Canada, to be a Puisne Judge of Her Majesty's Court of Queen's Bench for Upper Canada, in the room of the Hon. John Hawkins Hagarty. (Gazetted November 21, 1868.)

JOHN WELLINGTON GWYNNE, of Osgoode Hall and of the City of Toronto, in the Province of Ontario, one of Her Majesty's Counsel learned in the Law, to be a Puisne Judge of the Court of Common Pleas for Upper Canada, in the room of the Hon. Adam Wilson. (Gazetted Nov. 21, 1868.)

## COUNTY JUDGES.

ROBERT DENNISTOUN, of Osgoode Hall and of the Town of Peterborough, in the Province of Ontario, Esq., Barrister-at-Law, to be Judge of the County Court of the County of Peterborough, in the said Province, in the place and stead of Robert M. Boucher, Esq., deceased. (Gazetted July 18, 1868.)

## POLICE MAGISTRATES.

ABRAHAM DIAMOND, Esquire, of Osgoode Hall, Barrister-at-Law, to be Police Magistrate of the Town of Belleville, in the room and stead of Smith Bartlett, deceased. (Gazetted September 19, 1868.)

## COUNTY CROWN ATTORNEYS AND CLERKS OF THE PEACE.

JOHN DEWAR, jun., of Osgoode Hall, Esquire, Barrister-at-Law, to be County Attorney and Clerk of the Peace for the County of Halton, in the room and stead of G. T. Bastedo, Esquire, deceased. (Gazetted August 22, 1866.)

ALEXANDER SUTTON KIRKPATRICK, of Osgoode Hall, Esquire; Barrister-at-Law, to be County Attorney and Clerk of the Peace in and for the County of Frontenac, in the room and stead of R. M. Wilkison, Esquire, deceased. (Gazetted August 22, 1868.)

## REGISTRARS.

THOMAS HALL JOHNSON, of Pembroke, in the County of Renfrew, Esquire, to be Registrar for the unorganized District of Nipissing, in the room and stead of Richard O'Reilly, deceased. (Gazetted Sept. 12, 1868.)

## THE CHIEF JUSTICE OF THE COURT OF ERROR AND APPEAL.

## DIARY FOR FEBRUARY.

1. Mon.. Hilary Term begins.
2. Tues.. Purification Blessed Virgin Mary.
3. Wed.. Meeting of Grammar School Board. Intermediate Examination of Law Students and Articled Clerks.
5. Frid.. Paper Day, Queen's Bench. New Trial Day, Common Pleas.
6. Sat.. Paper Day, Common Pleas. New Trial Day, Queen's Bench.
7. SUN.. Quinquagesima.
8. Mon.. Paper Day, Queen's Bench. New Trial Day, Common Pleas.
9. Tues.. *Shrove Tuesday*. Paper Day, Common Pleas. New Term Day, Queen's Bench.
10. Wed.. *Ash Wednesday*. Paper Day, Queen's Bench. New Term Day, Common Pleas. Last day for setting down and giving notice for re-hearing. Last day for service for County Court, York.
11. Thur.. Paper Day, Common Pleas.
12. Frid.. New Term Day, Queen's Bench.
14. SUN.. *1st Sunday in Lent. St. Valentine.*
15. Mon.. Last day for County Treasurer to furnish to Clerks of Municipalities in Counties lists of lands liable to be sold for taxes.
18. Thur.. Re-hearing Term in Chancery commences.
20. Sat.. Declare for County Court York.
21. SUN.. *2nd Sunday in Lent.*
24. Wed.. *St. Matthias.*
25. SUN.. *3rd Sunday in Lent.*

THE

## Canada Law Journal.

FEBRUARY, 1869.

## THE CHIEF JUSTICE OF THE COURT OF ERROR AND APPEAL.

The last day of the old year was the silent witness of an event which, though not attended with any display, was a noticeable one in the judicial annals of the province. It was the occasion of the ex-Chief Justice of Ontario taking his seat as President (or, as he is now to be called, the Chief Justice) of the Court of Error and Appeal, and of the official presentation to him of an address by the Law Society, commemorative of the event and expressive of the feelings of the profession on his retirement from the more active duties devolving on him as a Judge of one of the Superior Courts.

The address, which was presented by Hon. John Hillyard Cameron, on behalf of the Society, was as follows:

"TO THE HONOURABLE WILLIAM HENRY DRAPER, C.B., PRESIDENT OF THE COURT OF ERROR AND APPEAL.

Her Majesty having been graciously pleased to accept your resignation as Chief Justice of Upper Canada, and subsequently to appoint you as President of the Court of Error and Appeal, we, the Law Society of Upper Canada, beg leave respectfully to address you, and to convey to you our

sincere thanks for the unvaried courtesy and kindness which, in the exercise of your judicial office, the members of the legal profession have received at your hands, for a period extending over more than twenty years.

It is to us a subject of unfeigned satisfaction that your talents and learning are not to be lost to the country, but that you will hereafter preside in the Court of ultimate resort in this Province.

We trust that on an occasion like the present you will excuse our calling attention to the course of your professional life as an example and encouragement to those who devote themselves to the study of the law, as showing that, without any adventitious aid, but solely by the exercise of your own ability and industry, you have successfully with satisfaction and applause discharged the duties of Solicitor-General, Attorney-General, Puisne Judge, and Chief Justice.

That you may long continue to fill the dignified position which you now hold, is the sincere prayer of the members of the Law Society.

J. HILLYARD CAMERON,

Treasurer.

Osgoode Hall, Dec. 31, 1868."

It would be an easy and a pleasing task to enlarge upon the sentiments of the Address, and to speak of the feelings of admiration so universally entertained for one so eminent; but all we could say would be but a mere repetition of what has so often been said before in these pages, in acknowledgment of the distinguished services and ability of the learned Judge, whose sphere of usefulness has now been transferred from the Court of Queen's Bench to the less active but more honorable position of presiding over the Court of ultimate resort in this Province.

His Lordship, in answer to the address, made the following reply:

"MR. TREASURER AND GENTLEMEN,

I thank you very sincerely for this address. Since my first appointment to the bench, it has been my constant effort to cultivate the most friendly relations with the bar, and I feel no slight gratification at my success, as testified by this mark of your approval, in which you mingle the expression of your satisfaction at my past career with a kind wish that I may yet a while continue to discharge judicial duties.

I have, in my turn, to express my warm acknowledgments to the bar, generally, for their universal attention and respect to me in my intercourse with them as a judge, as well as for unnumbered marks of kindness and regard to me



## THE CHIEF JUSTICE OF APPEAL—LAW REFORM ACT OF 1868.

individually. If I have attained any success in my efforts to maintain that confidence in the purity of the administration of justice in this Province, which existed in the days of my eminent predecessors, I owe it, first, to the co-operation of those learned judges who shared my labours, and next to the ability and assiduity of the members of the profession whom you represent.

Upwards of forty-five years ago I first entered my name on the books of the Law Society, of which I believe I have still the honour to be a bench; and though I passed some years in the active duties of public life, I never severed myself from the diligent practice of my profession. I rejoice that while sinking into the vale of declining years, I am still thought able to be of use, and that I can maintain the connexion which has existed during the best part of my life. I trust that I shall be enabled to pursue the same course which has procured for me this flattering mark of your esteem, and I look forward with a hopeful confidence to a continuance of that support and assistance to which I have been so deeply indebted in my past career."

The following brief particulars of the career of the Ex-Chief Justice will be interesting to our readers. He was born on the 11th March, 1801, and is now therefore nearly sixty-eight years of age. He commenced life as a cadet or midshipman in an East Indiaman, and has never forgotten his early nautical training. He came to this country some years afterwards, arriving in Cobourg on the 4th June, 1820, and commenced the study of the law in 1823, having articulated himself to Thomas Ward, Esq., of Port Hope. He subsequently went into the office of Hon. George Strange Boulton, of Cobourg, and was for some years Deputy Registrar of Northumberland and Durham. He afterwards came to Toronto, we believe at the suggestion of the late Sir John Robinson, then Attorney General.

He was called to the Bar on 16th June, 1828, nearly forty one years ago. On the 18th November, 1829, he was appointed Reporter to the King's Bench, which office he held until March, 1837, when, on 23rd March, he was appointed Solicitor General of Upper Canada, and made a member of the Executive Council in December following.

The union of the Provinces took place in February, 1841, and on the 13th of that month he became the first Attorney General for Upper Canada and Premier. He served in an official capacity at different times under the

following governors, viz.: Sir Francis Head, Sir George Arthur, Lord Sydenham, Sir Charles Bagot, Lord Metcalfe, Lord Cathcart, and Lord Elgin.

In 1842 he was made a Queen's counsel, at the same time as Henry John Boulton, Robert Baldwin, Henry Sherwood and James E. Small.

On the 10th April, 1843, he was appointed a Legislative Councillor of Canada, which office he resigned at Lord Metcalfe's request, in January, 1845, and was elected to the Legislative Assembly, where he again sat as Attorney General until 28th May, 1847.

On the 12th June following he was appointed a Puisne Judge of the Queen's Bench, taking the place vacant by the death of Mr. Justice Hagerman, where he remained until 5th February, 1856, when he succeeded Sir James Macaulay, as Chief Justice of the Court of Common Pleas. He presided there until he was transferred to the Queen's Bench, becoming Chief Justice of Upper Canada on the retirement of Chief Justice McLean, who was made President of the Court of Appeal on 22nd July, 1863. He has thus, step by step, arrived at the goal of his ambition, a position he expressed his determination to win, when but a student in the Town of Cobourg.

His energy, perseverance and ability has taken him a step beyond the place he looked forward to as his own. Long may he continue to be an honour to it. Long also may he to enjoy that increased measure of health which we are happy to think has been vouchsafed to him, and the pleasure of knowing that his services are appreciated by an intelligent profession, and that the confidence and esteem of the public are still his own.

## LAW REFORM ACT, 1868.

Curiously enough, on the very day that this Act came into force, a question came up for decision, which is reported in another place. We apprehend no other conclusion could have been arrived at, though there are some practical difficulties in the way which might be expected from one mode of procedure taking the place of another without the necessary provisions to prevent their clashing.

We notice an error of the press in sub-sec. 2, section 18, whereby a line has been accidentally omitted, and to which we hasten to call attention. The sub-section should read thus:—

## LAW EXAMINATIONS—ITEMS—FEES OF ATTORNEYS IN DIVISION COURTS.

"(2.) Provided that if any one or more of the parties requires such issue to be tried or damages to be assessed or enquired of by a Jury, he shall give notice to the Court in which such action is pending, and to the opposite party, *by filing with his last pleading and serving on the opposite party* a notice in writing to the effect following, that is to say," &c.

How, it may be asked, can this notice be filed, &c., with the last pleading in cases when, under the former practice, issue has been joined, and perhaps notice of trial given, or a case being made a remnant?

## LAW SOCIETY, HILARY TERM, 1869.

## CALLS TO BAR.

During this term the following gentlemen, having passed their final examination, were called to the Bar:—Alfred J. Wilkes, Brantford; Henry H. Strathy, Toronto; W. R. Squier, B.A., Goderich; Wm. G. McWilliams, B.A., Toronto; Colin McDougall, St. Thomas; George Taillon, Ottawa; W. M. Merritt, St. Thomas; E. C. Campbell, Newmarket; N. M. Monro, Toronto; John H. G. Hagarty, Toronto; John O'Donohoe, Toronto; A. G. Brown, St. Catharines; J. Dunning, Ottawa. The four first-named gentlemen passed without any oral examination.

## ADMISSIONS TO PRACTICE.

The following gentlemen were admitted as Attorneys:—Charles Moss, Toronto; John Muir, Grimsby; Alfred J. Wilkes, Brantford; Wm. G. McWilliams, Toronto; Henry H. Strathy, Toronto; A. G. Brown, St. Catharines; John H. G. Hagarty, Toronto; S. M. Jarvis, Cornwall; John R. Dixon, London; Robert C. Henderson; William A. McLean, Toronto; E. S. Essery, London; Joseph Ryan, Kingston. The first four gentlemen passed on the merits of their written examination, and had not therefore to be examined orally. Mr. Charles Moss was especially complimented by the Benchers on the thorough knowledge he evinced of the subjects for examination.

Some alterations have been made in the room wherein Chancery Chambers are held by the Judges' Secretary. Changes are generally supposed to be for the better, and in the matter of arrangement they are probably so in this case; in other respects, however, the Government have not much to be proud of. Their selection of some bare, unhappy looking pine tables, with splits between the

boards, would do discredit to a third-rate solicitor's office. We are not aware of any necessity to "nip in the bud" any incipient symptoms of luxury or extravagance on the part of the Secretary, who was himself, we believe, at the expense of laying down the matting thought unnecessary by the authorities.

The depredators at Osgoode Hall have not of late confined themselves to the west wing, as some nights ago the vault of the Queen's Bench office was broken into and some money, fortunately only a small sum however, was found and carried off, belonging to Mr. Baldwin, of the Stamp office. There have been, in addition to these burglaries, many minor pilferings at Osgoode Hall, but it is hoped that the authorities are on the track of some of the guilty parties.

## FEES TO ATTORNEYS IN DIVISION COURTS.

At the close of our last volume we published a letter criticising the soundness of a decision by a County Judge on the payment of fees to attorneys for work done by them, as such, in Division Courts. A letter was written in answer to this, which, however, did not throw much light on the subject, and "An Attorney," in another letter published hereafter, again returns to the charge.

We have taken the trouble to find out exactly what the learned Judge did say in his judgment, which appears to have been a written one. We allude to the case in which he lays down the rule which should, in his opinion, govern cases such as that spoken of by our correspondents. We do not gather from this judgment (which we apprehend "An Attorney" could not have seen), that the Judge entertained the opinion which the letters of "An Attorney" would lead us to suppose. With the details of the cases neither we nor our readers are at all interested, but it is a matter of simple fairness that the views of the Judge should be given in his own words; the subject, moreover, is of some importance, and worthy of discussion.

The part of the judgment touching on the point before us was as follows:—

"It is difficult to arrive at what is a fair and reasonable or proper allowance to make for services as an Attorney in the Division Courts, for the Superior and County Court tariffs are fixed,

## FEES OF ATTORNEYS IN DIVISION COURTS—ERROR AND APPEAL ACT.

and the retainer once proved, the amount can be ascertained by a reference to the proper officer. No tariff is fixed for the Division Courts, but it is not to be supposed that an Attorney is not to receive anything for practising therein. On the other hand I do not think him entitled to County Court costs (which the plaintiff appears to have charged,) for Division Court business. As there is a wide difference between Superior and County Court costs, which bear some relation to the jurisdiction of the respective Courts, so the costs in the Division Court, being of still more restricted jurisdiction, should be considerably less than those of the County Court. I have no authority, and do not feel inclined, to lay down or fix a tariff for all the items of Division Court business. I shall simply allow in each case a gross sum, and that not a large one, covering all charges in respect of the suit (except disbursements), and having some reference to the trouble taken and the interests involved. If members of the profession think my allowance too small, they can easily protect themselves by a previous arrangement with their clients, and this would, in all cases, be the fairest and most satisfactory way.

The plaintiff endeavours to shew that he came from ——— solely to attend to defendant's business. I do not think the evidence establishes this, and cannot allow the plaintiff anything for travelling expenses. I allow the plaintiff \$5.00 for each of the two suits, one at ——— and one at ———, less \$8.00 paid on suit at ——— Court, leaving \$7.00, and I allow 40 cents for postage and \$4.00 for subpoena and copies, making \$11.40 in all for Division Court business.

The witness fees, amount paid witnesses, and charge for copy of papers, appear to be covered by the \$9.00 paid plaintiff by ———."

Without at present discussing the propriety of this ruling, it can scarcely be said that the Judge decided that an Attorney has no right to recover for services rendered, as such, in Division Court suits, or that the judgment was not given upon some principle, which the Judge considered was a sound one, and which he in a subsequent suit by same plaintiff expressed his intention to follow.

So far as this particular case is concerned, this must close any further reference to it. As to the amount of remuneration, the Judge may or may not have given less than was proper under the circumstances. He, however, was the judge of that, and it is idle to discuss that part of the matter here.

## ERROR AND APPEAL ACT.

The following is the Act of last Session respecting the Court of Error and Appeal:

## AN ACT

*Respecting the Court of Error and Appeal in the Province of Ontario.*

[Assented to 23rd January, 1869.]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. The first section of the Act of the Parliament of Canada, passed in the twenty-fifth year of Her Majesty's reign, chapter eighteen, and entitled "An Act respecting the Court of Error and Appeal in Upper Canada" shall be amended by striking out the words "Upper Canada" where they occur in the said section, and inserting the word "Ontario" in lieu thereof, and by adding to the end thereof the words, "and shall be styled and addressed as the Chief Justice of Appeal."

2. The second section of the said Act shall be amended by striking out the words "Presiding Judge," and inserting the words "Chief Justice" in lieu thereof; and by striking out the words "Presiding Judge of the Court of Error and Appeal in Upper Canada," and inserting the words "Chief Justice of the Court of Error and Appeal in Ontario" in lieu thereof.

3. The fourth section of the said Act is hereby repealed, and the following provisions enacted in lieu thereof:—

4. From and after the passing of this Act, the said Court of Error and Appeal shall hold its sittings twice in every year, at the City of Toronto, one of which sittings shall be held in the month of January, and the other in the month of June, upon such days as the said Court by rule or order may, from time to time, respectively name and appoint, and the Court may also adjourn such sittings from day to day, or for such longer period, as the Court may deem expedient; and the Court may permit cases to be entered after the commencement of such sittings for any adjourned sittings of the Court, and upon such notice to the respondents as the Court may fix, and may make such rules and orders therefor as they may deem necessary; and may also fix and appoint days for giving judgment in cases previously argued, and for disposing of such other business as the Court in its discretion shall see fit: Provided there shall be no sitting of the said Court, by adjournment or otherwise, between the first day of July and the twenty-first day of August in any year, save for the purpose of giving judgment in cases previously argued.

5. Notice of such respective rules or orders shall be given by affixing the same in some conspicuous place on the outside of the rooms where the sittings of the said Court are appointed to be held, and in the Judge's Chambers and Practice Court, and in the offices of the

## CONVICTION UPON CIRCUMSTANTIAL EVIDENCE.

Master and Registrar of the Court of Chancery, and of the Clerks of the Crown and Pleas, in Osgoode Hall, ten days before the time appointed, which notice may be to the following effect:—

## IN THE COURT OF ERROR AND APPEAL.

"This Court will, on the — day of — 18—, hold sittings, and will proceed on that day and the following days, in hearing and disposing of the cases mentioned in the following list, and in giving judgment in cases mentioned in the following list, and in giving judgment in cases previously argued," [or if the Court sit only for giving judgment or in giving judgment in cases previously argued] and in disposing of such other business as the Court in its discretion shall see fit.

(List to be subjoined)

(Signed.)

Clerk.

6. From and after the passing of this Act, any six Judges of the said Court, of whom the Chief Justice of the said Court, or the Chancellor, or the Chief Justice of one of the Superior Courts of Common Law shall be one, shall constitute a quorum of the said Court for the dispatch of business: Provided that no more than two of the Judges whose judgment or decree is appealed from, shall sit on the hearing of such appeal.

7. So much of the fifty-second section of chapter thirteen of the Consolidated Statutes of Upper Canada as requires two months' service of notice of appeal, is hereby repealed.

## SELECTIONS.

## CONVICTION UPON CIRCUMSTANTIAL EVIDENCE.

The injustice of convicting persons of capital offences upon circumstantial evidence has been a fruitful theme of discussion time out of mind. We believe it is now generally conceded that crimes diminish in a country in proportion to the mildness of its laws. Evils certainly arise in having laws on the statute-book which are at variance with the universal instincts of mankind, and which are therefore continually evaded. The abolition of a bad law is attended with less injury to a community than its constant evasion. Heinous crimes are usually committed in secret, and the proof, therefore, is necessarily circumstantial. Evidence so precarious in its nature should indeed be closely scrutinized. In Scotland, long ago, they refused to convict of capital offences upon such evidence; and in England, since the conviction and execution of Eugene Aram—upon whose character and the circumstances of whose death, the versatile Bulwer founded a readable novel, and the gifted Hood wrote a touching poem—the courts have been prone to analyze carefully a case resting entirely upon such evidence. Aram, it will be remembered, was

indicted for killing one Daniel Clarke, and was convicted of his murder by a chain of circumstantial evidence, fourteen years after Clark was missed. The *corpus delicti* was not proved. The concatenation of circumstances which led to his conviction is among the most peculiar and remarkable on record.

In the trial of capital cases there are two time-honoured maxims which have always obtained. (1.) That *circumstantial evidence falls short of positive proof*: (2.) That *it is better that ten guilty persons should escape than one innocent person should suffer*. The first qualified by no restriction or limitation is not altogether true. For the conclusion that results from a concurrence of well authenticated circumstances, is always more to be depended upon than what is called positive proof in criminal matters, if unconfined by circumstances, *i. e.*, the oath of a single witness, who, after all, may be influenced by prejudice, or mistaken; and if by the word "better," in the second maxim, is meant more conducive to general utility, it would also seem to be unsound. And here we may endeavour to ascertain clearly what is understood in legal parlance by "circumstantial evidence." It may be observed that, every conclusion of the judgment, whatever may be its subject, is the result of evidence, a word which (derived from words in the dead languages signifying "to see," "to know,") by a natural sequence is applied to denote the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved; circumstantial evidence is of a nature identical with direct evidence, the distinction being, that by direct evidence is intended evidence which applies directly to the fact which forms the subject of inquiry, the *factum probandum*: circumstantial evidence is equally direct in its nature, but, as its name imports, it is direct evidence of a minor fact or facts, incidental to or usually connected with some other fact as its accident, and from which such other fact is inferred. Upon this general definition jurists substantially agree. For an illustration, then, of direct and indirect evidence, let us take a simple example. A witness deposes that he saw A. inflict a wound on B., from which cause B. instantly died. This is a case of direct evidence.—C. dies of poison, D. is proved to have had malice against him, and to have purchased poison wrapped in a particular paper, which paper is found in a secret drawer of D., but the poison gone. The evidence of these facts is direct, the facts themselves are indirect and circumstantial, as applicable to the inquiry whether a murder has been committed and whether it was committed by D. The judgment in such a case is essentially deductive and inferential. A distinguished statesman and orator (Burke's Works, vol. II., p. 624), has advanced the unqualified proposition that when circumstantial proof is in its greatest perfection, that is, when it is most abundant

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in circumstances, it is much superior to positive proof. At one time great injustice was done by condemning persons for murder when it had not been proved that a murder was perpetrated. The now well-recognized principle in jurisprudence that no murder can be held as having been committed till the body of the deceased has been found, has terminated this form of legal oppression. A common cause of injustice in trials for murder is the prevarication of the party charged. Finding himself, though innocent, placed in a very suspicious predicament, he invents a story in his defence and the deceit being discovered, he is at once presumed guilty. Sir Edward Coke mentions a melancholy case of a gentleman charged with having made away with his niece. Though he was innocent, in a state of trepidation he put forward another child as the one said to have been destroyed. The trick being discovered, the poor man was executed, a victim of his own disingenuousness.\*

\* The following case occurred in Edinburgh (*vide 2 Chambers' Miscellany*).

Catherine Shaw encouraged the addresses of John Lawson, which were insuperably objected to by her father, who urged her to receive the addresses of one Robertson. One evening being very urgent thereupon she peremptorily refused, declaring she preferred death to being Robertson's wife. The father became enraged, the daughter more positive, so that the words "barbarity, cruelty, and death," were frequently pronounced by the daughter. He locked her in the room and passed out. Many buildings in Edinburgh are divided into flats or floors, and Shaw resided in one of these flats, a partition only dividing his dwelling from that of one Morrison. Morrison had overheard the quarrel, and was impressed with the repetition of the above words, Catherine having pronounced them emphatically. For some little time after Shaw had gone out all was quiet; presently Morrison heard groans from Catherine. Alarmed, he ran to his neighbor, who entered Morrison's room with him and listened, when they not only heard groans, but distinctly heard Catherine murmur, "Cruel father, thou art the cause of my death." They at once hurried to Shaw's apartment, knocked but received no answer, and repeated the knocks, but no response came. A constable was procured, and an entrance forced, when Catherine was found weltering in her blood, a knife by her side. She was alive, but unable to speak, and on being questioned as to owing her death to her father, was only able to make a motion with her head, apparently in the affirmative, and expired. At this critical moment Shaw entered the room; seeing his neighbors and a constable in his room he appeared much disordered, but at the sight of his daughter, turned pale, trembled, and was ready to sink. The first surprise and succeeding horror left little doubt of his guilt in the breasts of the beholders; and even that little was removed when the constable discovered blood upon the shirt of Shaw. Upon a preliminary hearing he was committed. On his trial he acknowledged having confined his daughter to prevent her intercourse with Lawson; that he had frequently insisted on her marrying Robertson; and that he had quarrelled with her on the subject the evening she was found murdered, as the witness Morrison had deposed; but averred he left her unharmed, and that the blood found on his shirt was there in consequence of his having bled himself some days before, and the bandage becoming untied. These assertions did not weigh a feather with the jury in opposition to the strong circumstantial evidence of the daughter's expressions of "barbarity, cruelty, death," together with that apparently affirmative motion with her head, and of the blood so seemingly providentially discovered on Shaw's shirt. On these concurring statements Shaw was found guilty, and executed at Leith Walk. Was there a person in Edinburgh who believed the father guiltless? No, not one, notwithstanding his latest words, at the gallows, "I am innocent of my daughter's murder." A few months afterwards, as a man who had become the possessor of the late Shaw's apartments, was rummaging, by chance, in the chamber where Catherine died, he accidentally perceived a paper which had fallen into a cavity on one side of the chimney. It was folded as a letter, which on opening contained the following:—

The rules of evidence and the practical principles of jurisprudence have been methodized

"Barbarous father, your cruelty in having put it out of my power ever to join my fate to that of the only man I could love, and tyrannically insisting upon my marrying one whom I always hated, has made me form a resolution to put an end to an existence which is become a burden to me. I doubt not I shall find mercy in another world, for sure no benevolent Being can require that I should any longer live in torment to myself in this. My death I lay to your charge: when you read this, consider yourself as the inhuman wretch that plunged the murderous knife into the bosom of the unhappy

CATHERINE SHAW.

A few years ago a poor German came to New York, and took lodgings, where he was allowed to do his cooking in the same room with the family. The husband and wife lived in a perpetual quarrel. One day the German came into the kitchen with a chop-knife and a pan of potatoes, and began to pare them for his dinner. The quarrelsome couple were in a more violent altercation than usual; but he sat with his back towards them, and being ignorant of their language, felt in no danger of being involved in their disputes. But the woman, with a sudden and unexpected movement, snatched the knife from his hand and plunged it in her husband's heart. She had sufficient presence of mind to rush into the street and scream "murder." The poor foreigner in the meanwhile, seeing the wounded man reel, sprung forward to catch him in his arms, and drew out the knife. People from the street crowded in, and found him with the dying man in his arms, the knife in his hand, and blood upon his clothes. The wicked woman swore in the most positive terms that he had been fighting with her husband, and had stabbed him with that knife. The unfortunate German knew too little English to understand her accusation, or to tell his own story. He was dragged off to prison, and the true state of the case was made known through an interpreter; but it was not believed. Circumstantial evidence was extremely strong against the accused, and the real criminal swore unhesitatingly that she saw him commit the murder. He was executed, notwithstanding the most persevering efforts of his counsel, John Anthon, Esq., whose convictions of the man's innocence were so painfully strong, that from that day he refused to have any connection with a capital case. Some years after this tragic event the woman died, and on her death-bed confessed her agency in the diabolical transaction.

One of the most remarkable cases of conviction upon circumstantial evidence that has occurred in this country, is that of one Ratzky, who was tried and convicted in 1863, at the Oyer and Terminer in Brooklyn, N. Y. The case is known as the "Diamond Murder," and the circumstances of the case were in brief as follows:—

Ratzky boarded at a house in Carroll Street in said city, where one Fellner also boarded, who had a short time before come from Mentz, Germany. Fellner was about fifty years of age, had been a large dealer in diamonds in his native place, but, as shown, he had for certain causes absconded and fled to this country. On his passage over he became enamoured of one Miss Pfum, who was in company with her sister, a Mrs. Marks. On his trip over his gallantry and attentions gained for him, from the passengers, the appellation of "Don Juan," and Miss Pfum that of "Zerlina." Arriving at New York the two ladies engaged rooms at a house in East Broadway, and it was shown on the trial that their characters were not the most exemplary.

On Friday morning, a few days after Fellner and he had commenced to board in Carroll Street, Ratzky and he went to New York together. Fellner never returned to the house. His body was found washed ashore at Applegate Landing, near Middletown, N. J., four days after. On examination of the body it was found that the deceased had been murdered, there being twenty-one wounds on his breast. The body was identified by one Mrs. Schwenger, who boarded in the same house where Ratzky and Fellner had boarded. Ratzky fled under an assumed name, but was arrested in St. Louis, and finally brought to trial. His story of the affair is, in short, that, on the evening of the morning when he went to New York with Fellner, they called at the house where Mrs. Marks and Miss Pfum were. That Fellner and Miss Pfum were engaged in conversation for an hour, and that during the evening Fellner gave him a gold watch which Miss Pfum handed him from a jewel case belonging to Fellner. It was a little after 8 o'clock that evening when Ratzky informed Fellner that it was about time for them to go home. That he urged Fellner several times to go, but he and Miss Pfum were engaged in a lively conversation, and that at last upon further urging Fellner rose to go, kissed Miss Pfum with great

## CONVICTION UPON CIRCUMSTANTIAL EVIDENCE.

by a succession of wise men, as the best means of discriminating between truth and error.

*nonchalance* before those present, telling her that tomorrow he should leave for Chicago, and desiring her to answer his first letter from there. He embraced Miss Pfum, at the same time whispering something in her ear. They then left—arriving at the ferry, no boat was in, and they sat down on the cross-beam of the ferry dock; that Fellner took off his hat and wiped the perspiration from his forehead, at the same time handing his cane to Ratzky. When the boat came they went on board, he Ratzky, still retaining the cane. In a moment or two Fellner rose from his seat and walked up and down the cabin once or twice, then went on the deck, as Ratzky supposed, for the sake of breathing the cool air; that the boat shortly after started, and if Ratzky's story be true, he never after saw Fellner alive. That he waited for him to come off the boat when it reached Brooklyn side, but not seeing him asked the ferry-master if he had seen a man pass answering the description given. That he called out the name of Fellner at the top of his voice in order to find him, but concluded that he had gone home. If this story had been confirmed Ratzky would doubtless have been acquitted. It appeared on the trial that when the body was found Mrs. Schwenzer proposed to go and see it, when Ratzky endeavored to dissuade her from doing so. She visited Mrs. Marks, at Ratzky's request, who begged her not to say anything about the matter, giving her at the same time a sum of money to secure her silence. Ratzky soon after left the city. Fellner's body being identified, Mrs. Marks and Miss Pfum were arrested on suspicion as being *particeps criminis*. Miss Pfum committed suicide by hanging herself in the cell of a New York station-house a few days after her arrest.

(Webster, in his elaborate argument in the Knapp Case, declared that "suicide is confession.")

On the trial the prosecution argued upon the theory that Fellner and Ratzky crossed on the Hamilton Avenue ferry-boat to Brooklyn; that Ratzky induced Fellner to go to the club-house, which stands near the water at the foot of Court Street, in order to get drinks; that they had been there before, and that Ratzky having got him there he inflicted the stabs and dragged the body to the water's edge or into the water, and from that point Fellner's body floated into the bay and finally was thrown ashore four days after on the Jersey side. It was shown that Ratzky reached home the night in question at 10 o'clock, that he was heated when he got home, and had Fellner's cane and a parcel belonging to him in his possession; that he inquired if Fellner had come, and on being answered in the negative, he told the story as above. To some in the house he said that Fellner had gone to Chicago. The prosecution argued that Ratzky was the last person with Fellner; that he knew he had wealth—a motive for murder; that Fellner's disappearance on the ferry-boat was wholly irreconcilable with Ratzky's subsequent conduct. If he had mentioned the ferryman produced? If Ratzky did not know that Fellner had been made away with, would he have had his trunk broken open next morning and taken his clothes, while making no effort to avoid the risk he ran in case of Fellner's return? Do honest men break into trunks, tell conflicting stories, try to keep dead bodies from being identified, run away, assume disguises, and change their name?

The prosecution examined witnesses on the stand who swore that under a conjunction of favorable circumstances a body thrown into the water on Brooklyn side might float to Jersey shore. But four days had elapsed from the night on which the murder was committed, according to the prosecution, until the body was found. It was not decomposed when found; on the contrary, the blood came from the wounds when probed. It is generally known that a dead body will sink when thrown into the water, and will not rise until decomposition sets in and gases are generated to float it to the surface. The theory is, that it could not have floated, and if not, it was impossible that it could have been carried by the tide from Brooklyn to the Jersey shore. No witnesses were called in behalf of Ratzky, and the jury, after a consultation of fifteen minutes, returned a verdict of guilty. By the law of 1860, a person convicted of murder in the first degree must be confined in the state prison one year, and at the expiration of that time, the governor might order the death penalty to be enforced. By throwing the onus of enforcing the penalty on the governor, it was anticipated that the death penalty would be virtually abolished in the state. This law was in force when the murder was committed, but was repealed in 1862; Ratzky was convicted in 1863, and Judge Crown sentenced him to be hanged under the law then in force. On appeal, a new trial was denied, and it was further held, that the court erred in sentencing Ratzky under a law not on the statute-book when the murder was committed.

Having their origin in man's nature, as an intellectual and moral being; and founded (as an eloquent advocate has said) in the charities of religion, in the philosophy of nature, in the rules of history, and in the experience of common life: 29 St. Tr. 966.

The rules as laid down by Wills on Cir. Ev., other writers on the subject have repeated, and are as follows:—

(1.) The circumstances alleged as the basis of any legal inference must be strictly and indubitably connected with the *factum probandum*.

(2.) The *onus probandi* is on the party who asserts the existence of any fact which infers legal accountability: 1 Starkie's L. of Ev., 162; 1 Greenl. L. of Ev. c. 3.

(3.) In all cases, whether by direct or circumstantial evidence, the best evidence must be adduced which the nature of the case admits.

(4.) In order to justify the inference of legal guilt from circumstantial evidence, the discovery of the body necessarily affords the best evidence of the fact of death, of the identity of the individual, and most frequently also of the cause of the death. A conviction for murder, therefore, is never permitted in our day unless the body has been found, or there is equivalent proof of death by evidence leading directly to that result. The evidence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. This is a fundamental rule the *experimentum crucis* by which the relevancy and effect of circumstantial evidence must be estimated.

(5.) If there be any reasonable doubt as to the certainty of the connection of the circumstances with the *factum probandum*; as to the completeness of the proof of the *corpus delicti*; or as to the proper conclusion to be drawn from the evidence, it is safer to err in acquitting than convicting. This rule follows irresistibly as a deduction from the consideration of the numerous fallacies necessarily incidental to the formation of the judgment on indirect evidence and contingent probabilities, and from the impossibility in all cases of drawing the line between moral certainty and doubt. It has been truly said (Burnett on the C. L. of Scotland, p. 524) that, though in most cases of circumstantial evidence there is a possibility that the prisoner may be innocent, the same often holds in cases of direct evidence, where witnesses may err as to the identity of a person, or corruptly falsify, for reasons that are at the time unknown. As we have seen, the testimony of the senses cannot be implicitly depended upon, even where the veracity of the witness is unquestionable. As where Sir

Ratzky was, therefore, sent back for a re-sentence, and under the law of 1860, he is now in prison at the pleasure of the governor of the state, who may execute the sentence at any time, though an effort is being made to have him reprieved.

## CONVICTION ON CIRCUMSTANTIAL EVIDENCE—1868 IN ENGLAND.

Thomas Davenport, an eminent barrister, a gentleman of acute mind and strong understanding, swore positively to the persons of two men, whom he charged with robbing him in the open daylight. But they positively proved an *alibi*, and the men were acquitted: *Rex v. Wood and Brown*, 28 State Trials, p. 819; Annual Register 1784. Many of the cases where conviction was had upon evidence which was indirect or circumstantial, illustrate the assertion of Burke, that circumstantial evidence is often more reliable and positive than direct proof. Capital crimes are so rarely committed under circumstances which lead to positive unequivocal evidence of them, that presumptions are necessarily founded upon the connection with certain facts. So when the one is proved to have occurred the others are presumed to accompany them. Some presumptions of nature are so cogent and irresistible, the law adopts them as *presumptiones juris et de jure*. The question whether parties in criminal prosecutions ought to be allowed to testify in their own behalf has elicited much discussion during the past five years, and some states, Massachusetts and Maine among the number, have passed enactments allowing parties arraigned for capital offences to testify. Few know how numerous are the cases where it has subsequently been discovered that the innocent suffered instead of the guilty. One such case in an age is enough to make legislators pause before giving a vote against the abolition of capital punishment. But some say the old testament requires blood for blood. So it requires that women should be put to death for adultery, and men for doing work on the Sabbath, and children for cursing their parents; and "If an ox were to push with his horn, in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman, the ox shall be stoned, and his owner also shall be put to death." The commands given to the Jews in the old dispensation do not form the basis of any legal code in Christendom, and to select one commandment and leave the others out is manifestly absurd. It is to be hoped that, not alone from the chance of condemning a wrong party, but from general motives of humanity, and a consideration of the utter uselessness of public executions in the way of example, capital punishment will ere long be numbered among the extinct barbarisms, and other and more rational means adopted for maintaining the integrity of the law and the peace of society.—*American Law Reg.*

J. F. B.

## 1868 IN ENGLAND.

The year 1868 has presented us with 128 public general Acts, as its contribution to the statute roll. We have already, in our last volume, commented on the new statutes, and shall now confine ourselves to merely enumerating those which merit notice in a retrospec-

tive review of the year. Cap. 11 rectified a blunder in the Chancery Dispatch of Business Act of the previous session, by forbidding a single Lord Justice to rehear decrees made on motion. Ireland has no divorce court, and cap. 20 gives to the Irish Probate Court a jurisdiction precisely similar to that bestowed on the English Divorce Court by the Legitimacy Declaration Act of 1858; while cap. 77 has amended the law as to divorce appeals in England. Cap. 24 has abolished public executions. Cap. 37 has simplified the proof of public documents when put in evidence. Cap. 40 aims at removing certain difficulties arising in partition suits. Cap. 54 provides a machinery for enforcing English, Irish or Scotch judgments or decreets respectively in *all* parts of the United Kingdom. Cap. 68, which seems intended as a feeler or temporary measure, aims at assisting liquidation in bankruptcy and winding-up, by facilitating distribution in specie and foreclosure. Cap. 71 makes the stride of conferring admiralty jurisdiction on certain County Courts. Cap. 72 diminishes the requirements of the law as to promissory oaths. Cap. 73 restores the Parliamentary franchise to Revenue employés. Cap. 76, following the lead of the Bills of Lading Act and of the Policies of Assurance Act of 1867, renders marine policies effectively assignable. Cap. 104, the Bankruptcy Act, 1868, is one of the most important Acts of the year, being aimed at fraudulent composition deeds; and the reader may perhaps remember the rush of deeds which took place before it came into operation, and the subsequent falling off in their number. Cap. 107 ends the compulsory payment for Church-rates for merely ecclesiastical purposes, except where levied in support of a security on the rates, or, by local Act, in lieu of tithe; and cap. 117 does what hitherto could be done only by the Ecclesiastical Commissioners—viz; turns every full incumbent, other than a rector, into the name and style of a vicar. Cap. 110 empowers the Postmaster-General to buy and work all the telegraphs. Cap. 116 makes an excellent amendment in the law of larceny and embezzlement, by extending it to a partner appropriating from the co-partnership concern. Besides these we have the Railways Extension of Time Act and Regulation Act, and two Poor Law Amendment Acts, the Boundary Act, to settle the boundaries of Parliamentary constituencies, the Irish and Scotch Reform Acts, and the new Parliamentary Registration Act, which latter should, and probably will, receive some amendments. Finally, as the most important change of all, we have the Election Petitions or "Bribery" Acts, which transfers the jurisdiction over election petitions from the old committees to judges of the Common Pleas, and which though heartily to be welcomed, will not quite suppress electoral corruption. This, then, is a summary of the principal changes which 1868 have made in our statute law. We cannot say that we have discerned any improvements in the aver-

## 1868 IN ENGLAND—CONFLICT OF LAWS.

ago drafting or the verbiage of the statutes, but as a set-off to this we will rejoice in the hope that something will come of Mr. Shaw Lefevre's suggesting of omitting from the public statute volumes the "Public Local" and "Hybrid" Acts. Of measures dropped in Parliament, and which probably reappear, we may instance as important, Mr. Shaw Lefevre's Married Women's Property Bill, and that of the Earl of Lichfield to amend the Law of Friendly Societies. As to the labours of the Royal and Parliamentary Commissions, the Judicature Commission, the most important of all, has not yet reported. In addition to this we have had commissions appointed to inquire into the Scotch legal system, and the naturalization and neutrality laws, while the report of the digest of law commissioners and their schemes resulted in a species of competition among the junior Bar by the compilation of specimens of specimen digests, and the selection by the commissioners of the three gentlemen who are now engaged on Mortgage, Bills, of Exchange and Escheiments.

Turning from the Legislature and the statute-book to the courts and the legal profession, the past year has brought with it very many judicial changes. The veteran Lord Brougham is gone, and with him we have lost Lord Cranworth, Lord Wensleydale, Justice Shee, also Lord Curriehill; Mr. Commissioner Goulburn has been succeeded in the Bankruptcy Court by Mr. Bacon, Q.C., and we have also Mr. Edward James, Q.C., and Mr. Bullen, the eminent pleader, and tutor of almost all the younger portion of the junior Common Law Bar. In France, too, the veteran Berryer died lately, and, by express invitation on behalf of the Paris Bar, his funeral was attended by representatives of the English Bar. Of judicial appointments we have those of Lord Cairns to the Lord Chancellor, of Lord Justices Selwyn and Giffard, of Vice-Chancellor James, Justice Hannen, the three judges appointed under the Bribery Act, viz., Sir A. Cleasby, Sir W. R. Brett, and Sir G. Hayes, —the appointment of Mr. Justice O'Hagan to the Lord Chancellorship of Ireland, and lastly, the elevation, in which the whole profession will rejoice, of Vice-Chancellor Wood, as Lord Hatherley, to the woolsack.

Of judicial decisions;—the House of Lords gave an important judgment in *Lou v. Routledge* (16 W. R. 1081), on copyright as affecting aliens; while in *Grissell v. Bristowe* (17 W. R. 128) and *Coles v. Bristowe* (ib. 105) the Exchequer Chamber and the Court of Appeal in Chancery pronounced almost simultaneously upon the much-vexed liability of the stock-jobbers. The Exchequer Chamber have also reversed the ruling of the Exchequer as to infants' necessaries, in *Ryder v. Wombwell* (17 W. R. 167). In *Langton v. Waite* (16 W. R. 508), Vice-Chancellor Malins gave an important decision on stock mortgages, and in *Lloyd v. Banks* (ib. 988), Lord Cairns finally settled the law of putative notice in cases of

incumbrances made by a *cestui que trust*. In *Re Overend Gurney & Co., Ex parte Swan* (ib. 570) Vice-Chancellor Malins decided a point singularly bare of authority on payment of a bill of exchange, "*supra protest*." Vice-Chancellor Giffard, in *Guest v. The Covebridge Railway Company* (17 W. R. 7), illustrated the inconvenient operation of the Registration of Judgments Acts, and in *Lyon v. Home* (ib. 824) applied the equity rules as to undue influence to the case of a spiritualist medium and an eccentric old lady. Finally, the Court of Common Pleas negatived the claims of certain ladies to the Parliamentary franchise; and the decision of the Privy Council in the *St. Alban's case* is fresh in the recollection of everyone. In several cases the Equity Courts have ordered the sale of railway land where the line was actually working, on account of unpaid purchase-money. And we must not forget the credit due to Lord Cairns for clearing off all arrears of Chancery appeals before the Long Vacation.

During the year a speech of Mr. Justice Hannen, at the dinner of the Solicitors' Benevolent Society, again revived an old discussion as to the propriety of amalgamating the two branches of the profession; from this topic the public attention has been diverted to the present system of Bar Education, a subject which ere long will very probably engross still more attention, and we hope to some purpose. The general election has given rise to some seventy or eighty petitions, on which the new tribunal will try its powers; and the disestablishment of the Irish Church remains over for the new year. Having thus run, though very briefly, through the principal legal incidents of 1868, we wish our readers and the profession a happy new year.—*Solicitors' Journal*.

#### CONFLICT OF LAWS—LEX LOCI CONTRACTUS—BILL DRAWN AND INDORSED IN FRANCE AND ACCEPTED IN ENGLAND.

*Bradlaugh v. De Rin*, C.P., 16 W. R. 1128.

Not long ago we noticed (12 S. J. 400) the case of *Lebel v. Tucker* (16 W. R. 338), where it was held that an indorsee of a bill of exchange, drawn, accepted, and payable in England, might sue the acceptor here although the indorsement was made in France, and though good by English was invalid by French Law. A somewhat similar case has come before the Court of Common Pleas in *Bradlaugh v. De Rin*. There the bill was drawn in France, accepted in England, and then indorsed in France to the plaintiff. The indorsement was invalid by the French but good by the English law. The question was, could the plaintiff, claiming under this indorsement, sue the acceptor in England. The material distinction between the two cases is that in *Lebel v. Tucker* the bill was drawn in England, whereas in *Bradlaugh v. De Rin* it was drawn in France.

An older case, *Trinbey v. Vignier* (1 Bing. N. C. 151), decided long ago that where a bill



## CONFLICT OF LAWS—LIVES OF THE LORD CHANCELLORS.

is accepted as well as drawn in France, the law of France must prevail, and an indorsement invalid by the French law is insufficient to give a right of action in England.

*Bradlaugh v. De Rin* is therefore an intermediate case between *Lebel v. Tucker* and *Trinbey v. Vignier*. The majority of the Court held that it fell within the principle of *Trinbey v. Vignier*, and that the plaintiff could not recover. M. Smith, J., differed from this view, and held that as the acceptance was an English contract, it must follow the rule of *Lebel v. Tucker*.

There appear to us to be much stronger reasons for holding the opinion of M. Smith, J., than that of the majority of the Court. In the first place the acceptance in England clearly creates an English contract, and it would seem on principle that this contract would create the same obligation as between the acceptor and subsequent indorsees, whether it be written upon an English or a French bill. The drawing, the acceptance, and the different endorsements upon a bill are all different and entirely distinct contracts, and may be, and not unfrequently are, governed by entirely different laws; but the fact that the drawing of the bill is a French contract ought not to affect the liability or rights upon an English acceptance.

The question might be tried in this way:—Suppose a blank acceptance given in England and afterwards properly filled up by a drawer: would it make any difference to the acceptor's liability to subsequent indorsees whether the bill were in fact drawn in France, America, or Austria? Yet, according to *Bradlaugh v. De Rin* the acceptor's liability might be different in each of these cases. Again, suppose a bill drawn in France and accepted in England, and then indorsed, as suggested by M. Smith, J., in his judgement, in Vienna or America? what law is then to govern the indorsement: Is it that of the place of the indorsement, or of the drawing, or of the acceptance? If the principle of *Lebel v. Tucker* were followed, these difficulties would not arise. In any case, an English acceptance would give rise to the same rights and liabilities without being affected by the law of the place where the bill was drawn. M. Smith, J., notices at the end of his judgement that he differs from the opinion of the other learned judges, "with less reluctance than I should otherwise feel, because it seems to me that it would place the acceptors of bills in a position of great peril and difficulty if the law of the country of the indorsement, whatever it may be, and not the law of the place of acceptance and payment, is to govern" his liabilities.

In conclusion we may notice that *Bradlaugh v. De Rin* is not in terms opposed to *Lebel v. Tucker*, the judgments of which are carefully restricted to the precise facts before them. The principle, however, of that case seems to have a much wider application.—*Solicitors' Journal*.

## LIVES OF THE LORD CHANCELLORS.

Mr. Murray's list of forthcoming books opens with the announcement of "The Lives of Lord Lyndhurst and Lord Brougham, forming the concluding volume of the 'Lives of the Lord Chancellors,' by the late Lord Chancellor Campbell." The volume will be in one respect unique in the history of literature. The death of Lord Campbell preceded by about two years the death of Lord Lyndhurst, and that of Lord Brougham by about five years. It has seldom happened to the biographee, if we may coin such a term, to survive the biographer. The Xanthos of one of Mr. Browning's poems, who "died and could not write the chronicle," would scarcely have had that palliation of his literary inactivity allowed by a man of the late Lord Campbell's energy. He should have written the chronicle as that noble and learned lord wrote his lives of Lord Brougham and Lord Lyndhurst, before he died.

On one occasion in the House of Lords, Lord Lyndhurst expressed the alarm with which, on biographical considerations, the possibility of his death before that of Lord Campbell affected him, and Lord Campbell gave him a reassuring reply; and all the while Lord Campbell was composing his noble and learned friend's biography. Dr. Johnson, as is well known, said that if he thought Boswell had any idea of writing his life, he would take Boswell's. But this justifiable homicide, this man-slaughter in self defence, would have been no use against Lord Campbell. The lives were written.

It is curious to think of him returning home from the House of Peers after a sharp brush with Lord Brougham, to add a new touch to his noble friend's portrait, to give a turn to a feature and to deepen a shade, or heighten a color. Luther spitting on the portrait of Erasmus, or Dante depicting in his *Inferno* the likeness of his living enemies, would afford some parallel to Lord Campbell's literary labors, if Lord Campbell had not been too calm tempered and fair minded a man to misuse his pen for the gratification of personal resentment.

After all, the careers of Lord Brougham and Lord Lyndhurst were over before Lord Campbell set about writing their lives. The impartiality of history, if such a thing exists, is out of the question. By way of counterpoise, the judgment of a contemporary, actively engaged in law and in politics, upon the men and events of his own time, and a lawyer's and politician's estimate of his great rivals in law and politics, possess a degree of interest which does not always attach to the premature birth of contemporary biography.—*Daily News*.

## NEW YORK PENAL CODE.

## NEW YORK PENAL CODE.

(From the Solicitor's Journal.)

The New York Penal Code comprises every branch of the criminal law of that State, together with elaborate prison regulations, but does not include criminal procedure or the law of evidence. These subjects are contained in other codes. The Penal Code consists of one thickish large octavo volume. In common with its fellow codes, it is elaborately divided and subdivided into titles, chapters, and sections, with notes appended. The sections are never more than a few lines in length, and great care has been taken to employ throughout that brief, sententious language which seems to be regarded as the necessary characteristic of a code.

We subjoin a single section (section 241) as an example: "Homicide is murder in the following cases: 1. When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being. 2. When perpetrated by any act criminally dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. 3. When perpetrated, without any design to effect death, by a person engaged in the commission of a felony."

To frame a penal code is, of course, a comparatively easy task. The most determined opponents of innovation would probably admit that codification is so far practicable. Our formidable difficulties begin when we approach the question of a *civil* code. Still, even a penal code is no easy matter, and presents abundant obstacles to success. These obstacles Mr. Dudley Field and his colleagues have skillfully overcome. They have constructed a very fair penal code, not unworthy of the great State under whose auspices it has been produced; though hardly equal to such a masterpiece as our own Indian Code promises to be, if we may judge of it from those portions which are already complete.

The Penal Code of New York has been laid before the Legislature in a complete form, but has not yet become law. Inasmuch, however, as its provisions, with a few exceptions, are mere embodiments of the substance of the existing law, the code presents us with a very fair exposition of the *existing* criminal law of the State of New York. In fact, though not yet in force as a code, it already serves the purpose of a digest. This criminal law of New York is primarily derived from our own, and is in most respects identical with it. In some points, however, changes have been introduced. Some of these are important; others curious—at least, to English eyes. A glance at the Penal Code may, therefore, be both instructive and interesting. We premise that in all the points hereafter mentioned, except where it is otherwise stated, the Penal Code only embodies existing provisions of the

law of New York. We are not in the habit of considering the Americans a very strait-laced people, yet it is remarkable how often offences against morality, to which our criminal law does not extend, are prohibited by theirs. Thus, sections 38–51 of the Penal Code forbid Sabbath-breaking; under which head almost every kind of Sunday travelling is included. Contrast this with our Sunday excursion trains! Again, seduction for the purpose of prostitution is punishable by imprisonment for five years; as also is seduction under promise of marriage, unless the parties have subsequently married. Incest is similarly punishable (section 84). Betting or gaming to the amount of twenty-five dollars or upwards is a criminal offence, punishable by fine: though enactments of this kind seem not to be very rigidly enforced. The laws against drunkenness seem to be much the same as our own, with one or two curious additions. Mr. Abel Smith's bill has been anticipated in New York. All publicans selling strong drinks on Sunday are guilty of a misdemeanor (section 728); and the same penalty attaches to persons selling or giving away spirituous liquors on an election day. Moreover, it is a criminal offence to sell drinks at any time to an habitual drunkard (section 726). What would the great publican interest in this country say to such proposals? Another provision of a similar nature is still more curious. It is competent to a wife to request any publican or other person not to sell drink to her husband; and on that mere request being made without more, the publican is prohibited from selling drink to the husband, on pain of a fine and of becoming for ever incapable of holding a license (section 726).

It is proposed by the Code Commission that the exemption of a wife from punishment on account of acts done in her husband's presence should be considerably limited. According to the code as now drawn, such presence is no excuse in the cases, not only of treason and murder, but of abortion, keeping a bawdy-house, obscene exhibitions of books or prints, and other offences.

It is instructive at the present time to observe that, according to New York law, the administering, though not the receiving, of bribes at elections is a misdemeanor (sections 61 *et. seq.*). So, also, is treating, intimidation of any kind, and even the carriage of voters to the poll.

A peculiar feature of the New York law is the introduction of what we may call *minimum* terms of imprisonment, for serious offences. Thus a person found guilty of rape may be sentenced to any term of imprisonment *exceeding* five years; but he cannot be sentenced for a *less* term. And the same in certain other cases. This is an innovation which we do not admire. However serious the offence may be, it may occasionally happen that circumstances mitigate the crime to a very large extent. And in such cases a *minimum* term of imprison-

ment might press with much hardship. It would also operate in practice as an obstacle in the way of a conviction whenever there were mitigating circumstances. On the whole, we think that the discretionary power given by our law to the judge is right in principle; and we should regret to see it exchanged for any procrustean rule whatsoever. The adulteration of food is made a misdemeanor (section 451); though we do not quite understand whether this is a repetition of an existing law, or is merely a proposal of the Code Commission.

The existence of a state of society more lawless than our own is indicated by section 455, which makes it a misdemeanor to carry concealed weapons, while the mere manufacture or sale of "slung shot" is in itself a criminal offence (section 453). Section 469 contains a somewhat notable provision. It is thereby made a misdemeanor to make or publish any false statement or rumor in order to rig the market. Another stringent enactment is contained in section 520, which provides that every person making a false statement or return, whether written or oral, as the basis of taxation, shall be liable to the penalties of a misdemeanor.

The New York Code contains a provision directed against birdnesting; this applies, however, only to birdnesting in cemeteries (section 702); but with regard to this particular species of sport, its provisions are exceedingly precise. Not only is birdnesting, or the catching or killing of birds in cemeteries prohibited, but it is a criminal offence to buy or sell any birds so captured. It seems from a survey of this Code, that the New York criminal law is, or is capable of being, more stringent than our own; it certainly descends somewhat further into detail.

A letter appeared in the money article of the *Times* of last Tuesday, which raises a question as to the effect of the indorsement of a cheque by procuration, and is of considerable importance to bankers. It is well known that a forged indorsement upon a bill or cheque usually conveys no title whatever even to a *bonâ fide* indorsee for value. If therefore a banker pays a forged cheque he cannot debit his customers account with such payment, but must bear the loss himself, unless it was caused by the negligence of the customer. It is, however, enacted by section 19 of 16 & 17 Vict. c. 59, that "any draft . . . upon a banker payable to order on demand which . . . shall purport to be indorsed by the person to whom the same shall be drawn payable," shall be a sufficient authority to pay the amount, and it shall not be necessary for the banker to prove the indorsement "was made by or under the direction or authority of the person to whom the draft was made payable."

Some doubt has been felt as to whether the section applies to cheques indorsed by procuration. That is, whether a forged indorsement

by A. as agent to B., or by procuration in any other form, would protect a banker forging the cheque. It is clear that if the payee's name is forged the banker is safe, but is he less so if the forger uses his own name stating it to be as agent for the payee?

There is, we believe, no reported case upon this section, and as far as we know this question has never been judicially considered. The letter in the *Times* which we mentioned contains a statement of a case (apparently not reported anywhere) where Martin, B., ruled, it would seem at Nisi Prius, that the bankers were protected in a case such as we have suggested.

We imagine that there are not many persons who are aware of the case which, if the decision was as stated, ought to be more generally known.—*Solicitors' Journal*.

## ONTARIO REPORTS.

### COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, ESQ., Barrister-at-Law,  
Reporter to the Court.)

#### STRACHAN V. HOWCUTT.

*Law Reform Act 1868, sec. 17.*

A summons to refer a Superior Court case for trial to a County Court came on to be heard on 1st February, 1869, (on which day the Law Reform Act, 1868, came into force).

*Held*, that the plaintiff could amend his issue and proceed under that Act without any order. The summons was discharged, the parties agreeing as to costs.

*Quære*, as to authority of Judge to order costs to plaintiff. [Chambers, February 1, 1869.]

On 1st February, *Kennedy* moved absolute a summons to refer this case to the Judge of a County Court for trial.

*J. B. Read*, shewed cause:

This application is unnecessary as section 171 of the Law Reform last, 1868, says that "All issues of fact and assessments of damages in the Superior Courts of Common Law relating to debt, covenant and contract, where the amount is liquidated or ascertained by the signature of the defendant, may be tried and assessed in the County Court of the County where the venue is laid, if the plaintiff desire it, unless a Judge of such Superior Court shall otherwise order and upon such terms as he may deem meet, in which case, an entry shall be made in the issue and subsequent proceedings in words or to the effect of Form A. in the schedule to this Act, in place of the *venire facias*, &c."

The plaintiff can proceed under that Act, and the summons should be discharged.

*Kennedy contra*. Issue was joined in this case and the summons granted, before the Act referred to came into force and it should not be held to apply retrospectively. The provisions of sec. 18 would seem to show that it is not intended so to operate. In any case the plaintiff should have the costs up to this time.

ADAM WILSON, J.—There is no necessity for this order. When procedure alone is concerned the rule of interpretation of statutes, which might

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IN RE. JOHN THOMAS—HILLBORN V. MILLS ET AL.

[Insolv. Case.]

interfere with the vested rights, does not apply. The plaintiff can under the last Act, go to trial before the County Court Judge without any order and he may amend his issue in accordance therewith.

I doubt if I have any right to give costs to the plaintiff.

*Summons discharged, the defendant consenting to let the order go with ten shillings costs to plaintiff.*

### INSOLVENCY CASES.

(In the Co. Court of Prince Edward & Court of Chancery.)

#### IN THE MATTER OF JOHN THOMAS, AN INSOLVENT.

Upon an application for discharge of Insolvent under sub-sec. 10 of sec. 9 of Act of 1864, a creditor objected that it did not appear that insolvent had any estate, and therefore, did not come within provisions of the Act, and also, that Assignee had not given the notice mentioned in sec. 10, sub-sec. 1 of same Act.

*Held*, on appeal to Court of Chancery, reversing decision of the Judge of the County Court, that the discharge of insolvent should not have been refused on above grounds. [Chancery, June 8th, Sept. 9th, 16th, 1868.]

This insolvent made a voluntary assignment in March, 1867, to official assignee of County of Prince Edward a few days after all his property had been sold by the Sheriff. At the expiration of two months the assignee applied to the insolvent for funds to pay for advertising meeting of creditors for examination of the insolvent under sec. 10, sub-sec. 1 of Act of 1864. The insolvent replied that he had no money to give for the purpose, and the meeting was not called.

At the expiration of a year from date of assignment, insolvent not having obtained from the required proportion of the creditors a consent to his discharge, or the execution of a deed of composition and discharge, applied to the Judge of the County Court of Prince Edward for a discharge, having given notice of such application by advertisement as required by sub-sec. 10 of sec. 9 of Act of 1864.

*Allison*, for the only opposing creditors, objected, 1st, that it did not appear that the insolvent had any estate to assign, and therefore did not come within the provisions of the Act; 2nd, that the notice required by sec. 10, sub-sec. 1, had not been given by the assignee.

*O'lard* for insolvent, contended that the act applied to all persons unable to meet their engagement as mentioned in sec. 2 of the act, and it was not necessary that insolvent should be possessed of any estate at the time of assignment, otherwise a person in insolvent's position with several writs of executions hanging over him, could never obtain the benefit of the act. As to the second objection, that it was a question between creditors and assignee: that creditors who had notice of his assignment could at any time before discharge, and upon application for discharge, of which they also had notice, examine insolvent if they desired to do so: that insolvent could not be prejudiced by the omission or neglect of the assignee who might possibly be one of the principal creditors, and so, naturally opposed to insolvent's being discharged.

The learned judge of the County Court held that both objections were good, and refused the discharge. Upon this the insolvent applied for leave to appeal, which was granted by Mr. Justice

Adam Wilson. The case was subsequently heard in the Court of Chancery, by way of petition.

*J. C. Hamilton*, for the appellant, argued that the only grounds which any creditor could take on the application for discharge under section nine, sub-section ten, were those set forth in preceding sub-section six, which does not include the grounds acted on by the learned Judge. As to the second reason of the Judge, he argued that could not be valid under our law, which expressly applies in Ontario to all persons, whether traders or not, and that, consequently the decisions under the English bankruptcy law, prior to 1862, could not apply. It is stated that this was expressly so held by the late Judge of the County of York (The Hon. S. B. Harrison), in the case of Robert H. Brett, an Insolvent.

The following authorities were also cited: *Re Holt and Gray*, 13 Grant, 568; *Ex parte Glass and Elliott*; *Re Boswell*, 6 L. T. Rep. N. S. 407; *Re Parr*, 17 U. C. C. P. 621; *Ex parte Mitchell*, 1 DeGex Bankruptcy Cases, 257; *Re Williams*, 9 L. T. N. S. 358.

*VAN KOUGHNET, C.*—I think the County Court Judge wrong in the reasons assigned by his order refusing the certificate of discharge. The assignee's neglect of duty is no reason for depriving the debtor of his discharge. Any of the creditors could have applied to the Assignee, or to the Judge, to compel the Assignee to call a meeting for the examination of the Insolvent; and, I apprehend, this can yet be done, if the Assignee or Judge thinks it proper.

This want of assets does not appear to me to be, in itself, a sufficient reason for refusing the discharge.

Order of Judge reversed, and matter remitted to him to deal with in accordance herewith.\*

#### HILLBORN V. MILLS ET AL.

(In the County Court of the County of Elgin—Before His Honor Judge HUGHES.)

*Insolvency—Practice—Service of Papers—Irregularity, who may object to—Setting aside proceedings—Affirmation by Quaker—Taken before plaintiff's Attorney—Plaintiff, a surety and joint maker, taking up a note before due, so as to take proceedings in insolvency against joint maker.*

[St. Thomas, 8th October, 1868.]

The plaintiff was surety for the defendants upon a promissory note given to McPherson & Co., for \$195, which was not yet payable. The defendants owed the plaintiff a debt of \$50, and in order to make up a sufficient sum whereon to found an attachment against the defendants, who had absconded, the plaintiff paid the note to McPherson & Co., and then made affirmation to his debt amounting in the aggregate to a sufficient sum within the meaning of the 7th sub-section of the 3rd section. The plaintiff was a Quaker, and his affirmation commenced as follows:—"I, William Dillon Hillborn, of the township of Yarmouth, &c., do solemnly, sincerely and truly declare and affirm that I am one of the society called Quakers. I am the plaintiff in this cause. The defendants are indebted to me in a sum of \$385, currency, which sum is made up as follows," &c. Then followed the detail, and the particular note of McPherson & Co. is thus de-

\* The case on appeal is reported in 15 U. C. Chan. Rep. 196.—Eds. L. J.

## Insolv. Case.]

## HILLBORN V. MILLS ET AL.

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scribed: "A promissory note for \$195, including interest, dated 24th April last past, and payable on the 1st November next, to McPherson, Glasgow & Co., or order, which said note I signed as a joint and several maker with the said defendants, but only as a surety for them, the amount of which note I have paid to the said McPherson, Glasgow & Co.," &c., &c.

The attachment issued in the usual way to the sheriff, who seized all the property of the defendants, which was already in the hands of the bailiff of the Division Court, under seizure upon executions issued upon judgments in that court against the defendants, at the suit of one Backhouse and others, judgment creditors.

Mr. Ellis, attorney for Jugurtha Backhouse, one of the judgment creditors, presented a petition to the judge of the court, setting forth, 1st, his judgment and execution; 2nd, that the affidavits upon which the fiat for the attachment was issued were insufficient, and the proceedings thereon irregular, because, 1st, the plaintiff, being a Quaker, had not complied with the 1st section of the Con. Stat. of U. C., cap. 82, in first affirming that he was a Quaker, and, 2ndly, in affirming to the contents of the affirmation in the form of words prescribed by the statute: "I, A. B., do solemnly, sincerely and truly declare and affirm that," &c.; and that, in the absence of observing the form prescribed, the affirmation could not have the force and effect under the Insolvent Act of an affidavit, as required in the 7th sub-section of the 3rd section; and because, 2nd, the affirmation, such as it was, was sworn before the plaintiff's attorney; and because, 3rd, the affidavits of the other witnesses, proving the fact of defendants' insolvency, bore date before the plaintiff's so-called affirmation; and because, 4th, there was no sufficient debt to constitute plaintiff a creditor, so as to justify the adoption of these proceedings, by which defendants' estate was sought to be placed in compulsory liquidation. There were other objections taken to the proceedings, which it is not necessary to enumerate.

A summons was granted in the usual way for plaintiff or his attorney to show cause why the proceedings should not be set aside. The summons and petition were served on Saturday, the 10th October, returnable on the next Tuesday forenoon, the 13th October.

On Tuesday, the 13th October, Mr. McLean, attorney for plaintiff, attended to show cause, and objected, 1st, that the service of summons was insufficient under section 11, sub-section 9, of the Insolvent Act, which requires one clear day's notice, and cited the case of *Leffur v. Pitcher*, 1 Dow. N. S. 767; *Francis v. Beach*, 9 U. C. L. J., 266. 2nd. That the copy served was not a true copy. 3rd. That the petitioner here cannot, and that none but defendants can object to any irregularity in the proceedings, and cited section 3, sub-sections 3 and 4, and Arch. Prac. 12th edition, 1472; *Parker v. Howell*, 7 U. C. L. J., 209. 4th. That the informality or insufficiency complained of should be clearly set out on the affidavits, petition and summons, and cited section 11, sub-section 13, of the Insolvent Act, and Arch. Prac. 12 ed. 1476 and 1475. 5th. That the mode whereby a creditor is to obtain rights under his execution

are provided for by the Insolvency amendment Act of 1865, section 16, by petition, signified to the assignee and others interested. And lastly, as to the debt which constituted the plaintiff a creditor, in so far as the note of McPherson & Glasgow was concerned, that there is an implied promise to pay the plaintiff on the part of the defendants, so soon as an act of insolvency was committed.

*Ellis*, in reply, insisted that there was an implied authority for the petitioner to move to set aside the proceedings under sub-section 10 of section 3, the words "any petition," &c., also under the amended act, 1865, section 16, and cited *Parker v. McCrae*, 7 U. C. C. P. 124; and as to the liability of defendants for money paid by plaintiff, as their surety, cited *Andrew v. Hancock*, 5 E. C. L. R. 490; *Spragge v. Hammond*, 6 E. C. L. R. 37; *Gibson v. Bruce*, 44 E. C. L. R. 214; *Howlby v. Bell*, 54 E. C. L. R. 284.

On the same day the following judgment was delivered by

HUGHES, Co. J.—As to the service of the petition upon plaintiff's attorney, I consider it was quite sufficient to give the plaintiff one clear day's notice of it, to serve it as it was alleged to have been served on the evening of Saturday, returnable on Tuesday morning, within the meaning of the 9th sub-section of the 11th section, in the absence of any rule of court requiring papers in insolvency to be served before a particular hour. I do not know, and it was not shown, at what hour the petition and summons were served, nor is it shown by any affidavit that the copy served was not a true copy. The affidavit put in for the petitioner shows that Mr. Charles Ermatinger served them on Saturday, the 10th October, instant. Mr. McLean pointed out, in the copy of the petition he produced, some trifling and unimportant verbal defects and clerical errors, (just such as a clerk recently articulated, and unaccustomed to copy legal documents, often makes,) but which in this case were not calculated to mislead; it was a sufficiently perfected copy to enable the plaintiff's attorney fully to understand what the purport of the petition and application were. I therefore overrule that objection, for he received all the notice that was necessary.

As to the 3rd objection to the petition, I have met with some difficulty in satisfying myself, in view of there being no provision authorising the setting aside proceedings for irregularity at the instance of any other than the defendant. I know that it was at one time doubted whether a judge of a District Court, in vacation, had authority to set aside an interlocutory judgment, or give time to plead, because the District Court Act then existing, which constituted the court, and its practice did not specially prescribe such authority, and therefore the defect was subsequently supplied by the passing of 9th Vic. cap. 2, of the statutes of Canada. The judge of an inferior court is always held by the superior courts to be confined to the powers and jurisdiction conferred upon him by statute.

There is no doubt whatever that were this a proceeding which I could amend, I have full power conferred upon me by the 14th sub-section of the 11th section of the Act of 1864. On

## Insolv. Case.]

## HILLBORN V. MILLS ET AL.

## [Insolv. Case.]

the other hand, it has been urged that the proceeding is so manifestly without foundation, because there is not a sufficient compliance with the requirements of the 7th sub-section of section 8 (Act 1864), that any court must be held to have such an inherent jurisdiction as to require the law and practice of the court to be substantially complied with.

The judge of an inferior court cannot grant a new trial on the merits unless the statute gives him the power to do so: 1 Mosely on Inf. Courts, 283, but it has been held that if a judgment had been obtained by a fraudulent surprise, the judge may grant a new trial, *Bayley v. Bourne*, 1 Str. 392; so it has been held that the judge of an inferior court may grant a new trial for matters of irregularity, as where proceedings have been contrary to the practice and rules of the court; *Ib.*; and *vide Jewell v. Hill*, 1 Str. 499.

I find it laid down in Archbold's Bankruptcy Practice, 10 Ed. 378, for certain irregularities the court will annul the fiat, as for a misdescription of a place of residence of the petitioning creditor, but this was done by the Court of Review in Bankruptcy (see same Vol., p. 376). There is no Court of Review for Insolvency proceedings here, (as there used to be under the Bankrupt Act,) excepting in the way of an appeal from the decision of the judge, so that unless the judge has the power to set aside proceedings for irregularity it cannot be done at all, no matter how irregular they may be.

The strict wording of the 12th sub-section of the 3rd section gives no more right to the defendant than to this petitioner to move the judge, nor power to the judge to set aside proceedings for irregularity; the sole ground upon which defendant can petition to have the proceedings set aside is on the ground that his estate has not become subject to compulsory liquidation, which involves merely in strictness an enquiry upon the merits.

I apprehend, however, that the power to control and enforce the practice of the court must exist somewhere, and must be primarily in the judge, subject to an appeal: that is what I must, therefore, hold at present, until I am better advised, and that the 7th section of the amended Act of 1865, with reference to the "*contesting of proceedings*," applies to the different modes by which proceedings in Insolvency might be contested, as they are in England, by actions of trespass and trover, and the like, notwithstanding proceedings of adjudication in the Court of Bankruptcy there—and which, but for that 7th section, might be instituted here for the same purpose. Here, that section makes all such proceedings conclusive for all purposes after a certain time, which, to my mind, argues in favor of, instead of against the application of this petitioner, and of all such applications by those who may be interested in the proceedings or in the defendants' estate.

In England a creditor may pray to annul a fiat, even although privy to the very act on which he grounds his objection to the fiat, (see Arch. Prac. in Bank. 394,) or any party not a creditor who can shew he sustains a grievance from the fiat, as a trustee under a deed which the fiat will overreach (*idem* 395); even a stranger sum-

moned to give evidence before the commissioner, can petition to annul the fiat, and the plaintiff in an action to which an attorney (the bankrupt) had been attached for not putting in bail in pursuance of his undertaking, had a sufficient interest to annul the fiat (*idem* 395); an adjudication must be supported by all the legal requisites (see *ex parte Brown*, 1 D. M. & G. 456; 1 Doria & Maorae, Bankruptcy, 322.) so that on the whole I think the petitioner here, who swears he is, and whose petition sets forth how he is a creditor, has in this court a sufficient interest to give him a *locus standi* upon an application of this nature, notwithstanding the decisions of the judges at Common Law in the cases cited, and of *Wilson v. Wilson*, 2 Practice Rep. 374.

Then it was further objected that the informality and insufficiency complained of should have been clearly set out in the petition, or affidavit, or summons. This no doubt would be a sufficient objection in an ordinary court of law, with an established set of rules or practice; but in the absence of all such, and with a summons referring to a petition and papers filed and served, especially setting forth that plaintiff's affirmation was informal and insufficient in law in several respects, I think it is all that any court or rules of practice could reasonably require.

The first of these objections is that the plaintiff, a Quaker, did not affirm as required by law. The 1st section of the C. S. of U. C., cap. 32, is a permissive enactment for the *relief and benefit of particular sects*, and after having first made the declaration presented as to their membership of the particular society, provides that they "may make the affirmation or declaration in the form therein following," that is to say: "I, A. B., do solemnly, sincerely and truly declare and affirm," &c. Both declarations are requisite, and the making of the one and dispensing with the other does not so comply with the statute as to give the affirmation of such privileged persons as the plaintiff the same force and effect as an oath taken in the usual form. In Upper Canada the creditor, under the 7th sub-section of the 3rd section, must, by "*affidavit*" of himself or any other individual, show, to the satisfaction of the judge, that he is a creditor of the defendants, &c. There were three ways in which he might have acted: either by swearing to the necessary affidavit himself, or getting some one else to act as his agent and make the affidavit, or to have complied strictly with the 1st section of the Con. Stat. of U. C., cap. 32, whereby "*the affirmation or declaration would have the same force and effect, to all intents and purposes, in all courts of law and equity, and all other places, as an oath taken in the usual form.*" He did neither; and in the absence of either I think the attachment, and all proceedings under it, irregular, and must be set aside.

As to the objection that the plaintiff's affirmation was made before Mr. McLean, the plaintiff's attorney prosecuting the attachment, the case of *Ex parte Coldwell*, 3 DeG. & S., 864, cited in 1 Doria & McRae, 322, shews that it is invalid and unsustainable, because the mere circumstance of the affidavit filed in support of the petition for adjudication being sworn before a Master Extraordinary in Chancery in England,

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who was solicitor to the petitioning creditor, was held to be not sufficient for annulling the adjudication; and in the absence of any rule of practice I must hold the 25th section of the amendment Act of 1865 has been sufficiently complied with here.

I do not think it necessary, at present, to go into the other grounds taken on the petition, as to the existence of a sufficient debt whereon to ground a fiat for attachment so as to constitute the plaintiff a creditor of the defendants, because it would take up more time than I have at my disposal. I will, however, say that I have very strong doubts as to whether a person who is a surety, as this plaintiff was, can legally go and pay up a promissory note before it is due, for the purpose of adopting proceedings in insolvency, and claim to be a creditor of the defendant, as this plaintiff has done. He might, perhaps, upon a regular transfer of a negotiable note, on which he is endorser, but I doubt if he could where he is merely the joint maker with the defendants, as their surety. (See *Ex parte Brown*, 1 D. M. & G., 461, and *Ex parte Greenstock*, DeGex., 230).

It is therefore ordered that the judge's fiat and the writ of attachment be set aside and quashed, and that all proceedings under it be also set aside and annulled, with costs.

## ENGLISH REPORTS.

### CHANCERY.

#### THEXTON V. EDMONDSTON.

*Practice*—15 & 16 Vict. c. 86, s. 36—*Discovery of material witness after evidence closed.*

A specific legatee of chattels, plaintiff in an administration suit, discovered, after the evidence had been closed in the suit, a witness who could give material evidence that the testator at the time of his death possessed certain articles within the terms of the specific bequest, the existence of which was denied by the defendants.

*Held*, that the evidence was not admissible. Summary of the classes of cases in which the Court allows further evidence to be received.

[M. R., March 12, 1868, 16 W. R. 833.]

This was an application under section 38 of the Act 15 & 16 Vict. c. 85, for leave to put in further evidence after the time fixed for closing the evidence had expired. The suit was one for administration, the plaintiff being a residuary legatee of certain personal chattels, and the evidence had been closed on the 11th January.

The plaintiff's solicitor now deposed that on the 10th February one of the parties interested in the estate to be administered in the suit called on him to inquire when the assets would be distributed, and in course of conversation gave him the names of persons who it was believed would be able to give important evidence that the testator in the pleadings mentioned possessed at time of his death valuable articles of silver, plate, and other jewellery which had not been delivered over to the plaintiff as directed by the testator's will, and which the defendant denied the testator to have possessed at the time of his death; that since the 10th February he had applied to one of the parties named who could give most material and important evidence on the question, and had also given him information which would, as

he believed, lead to his obtaining a further affidavit from another witness on the same subject, and that he had no means of knowing the aforesaid evidence was obtainable until the said 10th February, nor, as he verily believed, had the plaintiff, or his country solicitor, until informed by the deponent, and that in his judgment and belief it was material and necessary in support of the plaintiff's case, on the above question, that he should be permitted to give further evidence of the plate and jewellery possessed by the testator at the time of his death.

*W. Pearson*, in support of the application, referred to *Watson v. Cleaver*, 2 W. R. 265, 20 Beav. 137; *Douglas v. Archbutt*, 5 W. R. 393, 23 Beav. 293; *Scott v. The Corporation of Liverpool*, 5 W. R. 669, D. & J. 369; *Boysse v. Colclough*, 3 W. R. 8, 1 K. & J. 127; and *Hope v. Threlfall*, 2 W. R. 4, 1 Sm. & G. App. 21. In an unreported case *Price v. Bostock* (V. C. W., 27th May, 1858), an extension of time for one month was given to the defendant for filing affidavits in reply, the plaintiff having given evidence of material facts not averred in his bill; and in *Smith v. Meadows* (V. C. K., 9th June, 1864), also unreported, evidence was allowed to be given by the plaintiff of acts showing that if the defendant had not executed a deed in question she was at all events bound by it. Here the defendants deny the existence of certain chattels. We, after the evidence has been closed, discover a person who knows material facts about them, and from whom we had no reason to suspect any evidence could have been obtained.

*North*, for the defendants, was not called on.

Lord ROMILLY, M. R.—I cannot grant this application. The only grounds on which I have allowed evidence in a cause to be given after the time for closing the evidence had expired are, (1) where one of the parties swears that he has not seen the evidence on the other side, and comes within a reasonable time; (2) where, on the evidence, a new issue arises, not raised by the pleadings, but very material to the question to be decided, the point being, however, reserved whether the further evidence can, in such a case, be introduced; (3) where the character of a witness is impugned, when the witness is allowed to meet the charge; and (4) where, after the evidence has been closed, new facts have happened. The present application cannot be supported upon any of these grounds, and must be dismissed with costs.

### QUEEN'S BENCH.

#### ROWE V. HOPWOOD.

*Infant, contract with*—*Ratification by, after coming of age*—9 Geo. IV., c. 14, s. 5.

Goods were supplied to an infant who, after he came of age, signed, at the foot of an account containing the items and prices, the following memorandum:—"I certify that this account is correct and satisfactory."

*Held*, that this was no more than an admission of the correctness of the items and charges, and did not amount to a ratification, on which the defendant could be charged under 9 Geo. IV., c. 14, s. 5.

[W. R., Nov. 14, 1868.]

This was an action tried at the last assizes at Cambridge, before the Lord Chief Justice. The action was for goods sold and delivered, being wine supplied to the defendant. There was a

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plea of infancy, and a replication that the defendant ratified and confirmed the debt after he became of age.

It was proved in evidence that after the defendant attained twenty-one years the plaintiff took an account to him which contained the items and prices, and on which was already written, "Particulars of an account to the end of 1867; I certify that this account is correct and satisfactory." This the defendant signed; and in this it was alleged the ratification consisted.

The learned judge directed the jury that this was insufficient, and that they should find a verdict for the defendant, but reserved leave to the plaintiff to move to set aside the nonsuit. The statute 9 Geo. IV., c. 14, s. 5, enacts that "no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon ratification after full age of any promise or simple contract made during infancy, unless such promise or any ratification shall be made by some writing signed by the party to be charged therewith."

*O'Malley*, Q.C., now moved accordingly. He argued that there was a sufficient recognition, or at least evidence of an account stated. The words used need not be such that a promise can be implied from them, but it is sufficient that there should be an acknowledgment of the debt. He cited *Harris v. Wall*, 1 Ex. 122; *Hartley v. Wharton*, 11 Ad. & E. 934.

COCKBURN, J.—I think there should be no rule. The statute requires that any recognition of a debt incurred by a person under age, made after he has arrived at full age, must be in writing if any action is to be maintained on it, and therefore the effect of such written document is a question for the court, and not for the jury. There must be, in my opinion, a recognition of the debt binding on the debtor. In the present case there was an account submitted to the defendant, and when we look at the supposed recognition, we find it is only an admission that the items are properly set out, and that the sums charged for them are satisfactory in amount. This is not sufficient. We ought to have a recognition of the account as a subsisting liability. I do not think the terms here used amount to that, and therefore there should be no rule.

LUSH, HANNEN and HAYES, JJ., concurred.  
Rule refused.

### COMMON PLEAS.

#### WORSAM V. VANDENBRANDE.

If there be adverse possession of land, that adverse possession will be interrupted (so as to cause the Statute of Limitations to cease to run as against the true owner) by the true owner entering upon the land, asserting his rights, and entirely removing that which constituted the possession of the tortious possessor. And as a matter of law it is unnecessary for the true owner to go on and show that he continued in possession.

[W. R., Nov. 21, 1868.]

This was an action of ejectment, tried on June 26th, before Keating, J., at the sittings in Middesex, after last term. There was a verdict for the plaintiff.

To-day the court was moved for a rule to show cause why the verdict should not be entered for the defendants, on the ground that there was no evidence at the trial to go to the jury in favor of the plaintiff.

In this case the plaintiffs showed a paper title, and the defendant claimed, under the Statute of Limitations, as having had continuous adverse possession for more than twenty years.

The paper title of the plaintiff was not disputed, but the continuous possession of the defendant for twenty years was denied by the plaintiffs. The interruption on which they relied took place between nineteen and twenty years before the writ in the present action was issued. Upon that occasion those whom the present plaintiffs represent went to the land, and with implements which they had brought broke down the fence which enclosed the land, and erected a post on the close, to which they affixed a board, on which was painted a statement that any one who desired to take a lease of the land should apply to those on whose behalf the entrance had thus been made. At the time this was done the close was undoubtedly in the possession of those under whom the defendant claimed. But that possession was evinced solely by the fence.

The plaintiffs' party remained on the land three quarters of an hour. Three days after this the post and board were gone, but there was no evidence to show who had removed them, nor was there evidence of any subsequent dealing with the land by act thereupon by any one for the next five years. After that period the possession of the defendant was evinced by acts of the most unequivocal kind—namely, by the erection of buildings.

The sole question raised to-day was whether the entry just described was a mere entry, or was such a dealing with the land as amounted to taking possession so as to interrupt the adverse possession of the defendant.

*Sir Robert Collier*, and *Philbrick*, for the defendant. The question turns on 8 & 4 Wm. IV., c. 27, ss. 2, 3, 10. Though the plaintiffs made an entry in 1848, yet they never were in genuine possession. No notice seems to have been given to the defendant, and the entry was made behind his back, nor does it appear that the entry was made under professional advice. There was no evidence to show that those who pulled down the fence knew who put it up. *Doe d. Baker v. Coombes*, 9 C. B. 714, is a stronger case than the present. But the acts there were held not to amount to possession. The presumption from the defendant's subsequent dealing with the land is that he took possession immediately after the entry in 1848. Though no subsequent act on the land was proved earlier than 1853, yet the defendant let the land before that year. [BOVILL, C.J.—Yes, but that is only paper against paper. What you have to make out is a title by adverse possession.] *R. v. The Inhabitants of Wooburn*, 10 B. & C. 846, is in my favour also.

BOVILL, C.J.—The verdict must stand. The commencement of the defendant's title was in 1845. A fence is put up. This is the sole thing done on the land then. If this had continued, the title of the defendant would have been good. In 1848 the fence is destroyed by the true owner



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partially, as some say, wholly as others say. But now we must hold that it was wholly destroyed, for there was evidence to go to the jury that it was wholly destroyed. The post and the board are erected. Now is this taking possession or is it a mere entry? There had been no adverse possession but the fence. When that was pulled down I cannot see that anything remained to make the possession of the defendant. The case of the plaintiff does not rest wholly on the pulling down the fence, and then erecting the post, but also on this, that there is no evidence from 1848 to 1858 of any act on the land hostile to the title of the true owner. *Doe v. Coombes* seems to me to support the present view. The party was there in possession, and what was held there was that what was done was no divesting of possession. In the case of *R. v. The Inhabitants of Woodburn* there was a hut on the land, and those on the land do not seem to have been turned off.

BYLES, J., concurred, and cited Sir Edward Sugden's commentary on section 10 of 8 & 4 Wm. IV., c. 27.

KEATING and BRETT, JJ., concurred.

*Rule refused.*

#### GODWIN V. BRIND AND OTHERS.

*Principal and agent—Power "to treat" for sale of land.*

A. and B. advertised an estate for sale. The advertisement stated "in front and view the property applications are to be made to A. or B."

Held, that this did not give A. authority to sell the estate, so as to bind B., without his concurrence,  
[C. P., 17 W. R. 29.]

This was an action for breach of contract, tried before Mellor, J., at Salisbury, when the plaintiff was nonsuited on his opening.

The facts stated were that the plaintiff, who was a brewer in Wiltshire, saw in a newspaper an advertisement of an estate for sale; and, in consequence of seeing this advertisement, he went to view the estate, and entered into an agreement to purchase it for about £10,000. The advertisement, which it was admitted was inserted in the newspapers by authority of all the defendants in this action, was, as far as material, as follows:—"To treat, and view the property, applications are to be made to Mr. George Brind, or to Mr. Walter Brind, on the premises; also to Mr. John Brind, of, &c.; or to Mr. Benjamin Francis, of, &c." The defendants were the four persons mentioned in this advertisement, and they were joint owners of the estate.

The contract with the plaintiff was signed by Mr. Francis alone; but the other defendants repudiated the bargain, and sold the estate to another purchaser at a slightly increased price.

H. T. Cole, Q. C., moved for a new trial, on the ground of misdirection, and contended that by the terms of the advertisement any one of the defendants had power to bind the rest of them.

BOVILL, C. J.—I think my brother Mellor construed the advertisement rightly. It authorised persons to view and enter into negotiations with any of these four defendants, but it did not authorise any one of the defendants to conclude the important matter of sale.

BYLES, J.—The words are "to treat and view." Who, then, is to view? The intending purchaser. And so it comes to this, "you, the

intending purchaser, may treat with any one of the four."

KEATING and BRETT, JJ., concurred.

*Rule refused.*

#### UNITED STATES REPORTS.

##### NEEL'S ADMINISTRATOR V. NEEL.

Where a family relationship exists, as, for instance, between father and son or grandson, or uncle and nephew, or even more remotely, no implied promise to pay for services rendered in such relation between the parties, arises.

In such cases a contract or express promise to pay for services, must be established in order to enable the claimant to recover, and the evidence ought to be clear and satisfactory, otherwise the services will be referred to the relationship.

But where there is evidence of a contract, if it be unwritten, it is always for the jury to say whether it establishes the claim of the plaintiff or not.

If the testimony show that the family relation once existing has been changed to a contract to pay wages, the claimant will be entitled to recover: and if no sum be fixed he may recover as per *quantum meruit*.

Where an amendment to the *narr.* would have been allowed on trial, if objection had been made, after verdict it will be treated as amended, in accordance with the evidence and trial.

Error to District Court of Allegheny County.

*Woods* for plaintiff in error.

*Large contra.*

The opinion of the court was delivered at Pittsburgh, Nov. 16, 1868, by

THOMPSON, C. J.—There is a well defined line of decision in this Commonwealth, to the effect that where a family relationship exists, for instance, as between father and son, or grandson, or uncle and nephew, or even more remotely, no implied promise to pay for services rendered in such relation between the parties arises. In such cases a contract, or express promise to pay for services, must be established in order to enable the claimant to recover, and the evidence ought to be clear and satisfactory, otherwise the services will be referred to the relationship. But when there is evidence of a contract, if it be unwritten, it is always for the jury to say whether it establishes the claim of the plaintiff or not.

In the case in hand, there was evidence of a promise by the intestate to pay wages to the plaintiff if he would remain and manage the farm for him. No such contract existed when he first went to live with his uncle, but having grown to man's estate he talked of leaving, as he had a perfect right to do, when, it is alleged, a promise to pay was made if he would remain, and it is in full proof that he remained and faithfully attended to the farm, as well as other business of the intestate. One witness testifies that in 1856, the intestate represented to him that the plaintiff talked of leaving him, and requested the witness, the plaintiff's brother, to speak to him and prevail on him to remain. That he did so, and that he remained. The same witness further said, that in 1857 General Neel promised to pay him wages, but did not say what he would give. Another witness testified that in 1864 she heard her grandfather, the intestate, tell the plaintiff he would give him \$1,500 a-year if he would remain on the farm with him. He did remain, although he had been then talking of leaving. Was this a promise to pay wages, or was it a testamentary

## DIGEST OF ENGLISH LAW REPORTS.

promise? There was nothing to give any plausibility to the idea that it was the latter. The learned judge therefore left it to the jury to say from the testimony whether there was a promise to pay wages. He fully admitted in his charge the defendant's position, that if the plaintiff occupied a mere family relation on the farm, no implied promise would arise to entitle him to recover. He also affirmed the plaintiff's position, that if the testimony showed that the family relation once existing had been changed to a contract to pay wages, the plaintiff would be entitled to recover. He could not do otherwise in the face of the testimony, although it was none of the strongest. Yet it was hardly possible to doubt that the original relation was changed, at least after 1857, taking the testimony to be credible, and certainly after the promises to the same effect in 1864, it was more easily to be credited.

No sum was fixed and agreed upon in any of these conversations when promises were made, if made at all. It therefore entitled the plaintiff to recover as for a *quantum meruit*, if the testimony sustained it. And this he would be entitled to recover for services for six years anterior to the bringing of the suit; and so the judge submitted the case to the jury. As already said, we see not how the judge, without error, could have done otherwise. If the jury have given the plaintiff a large verdict, having found a promise to pay, we cannot correct it; nor could the court below, unless it considered it excessive. We see no error thus far—nor anything to complain of in the answer of the court to the defendant's third point.

We now recur to the first assignment of error, namely: That under the pleadings and issue, no verdict or judgment could be rendered for the plaintiff.

The exception results from a mere slip of the pleader in stating the promise to have been that of the administrator instead of the intestate. The case was tried throughout as against the estate of the latter. Had the objection been made at the trial, an amendment would have been allowed at once. After verdict we will treat the *narr.* as amended in accordance with the evidence and trial. Seeing nothing wrong in the record, the judgment is affirmed.

## DIGEST.

## DIGEST OF ENGLISH LAW REPORTS.

FOR AUGUST, SEPTEMBER AND OCTOBER, 1868.

(Continued from Vol. IV. page 297.)

ABATEMENT—See TRUST.

ACCORD AND SATISFACTION—See ACTION, 2.

ACTION.

1. Declaration that defendant wrongfully, negligently, and improperly hung a chandelier in a public-house, knowing that the plaintiff and others were likely to be therein and under the chandelier, and that the chandelier, unless properly hung, was likely to fall upon and injure

them; and that, the plaintiff being lawfully in the public-house, the chandelier fell upon and injured him. *Held*, bad, on demurrer, as not disclosing any duty by the defendant towards the plaintiff, for breach of which an action would lie.—*Collins v. Seldon*, Law Rep. 3 C. P. 495.

2. Declaration by the widow of A., under 9 & 10 Vict. c. 93, and 27 & 28 Vict. c. 95, against a railway company for negligence, whereby A. was injured, of which injuries he died. Plea, that in the lifetime of A. the defendants paid him, and he accepted, a sum of money in satisfaction and discharge of all claims and causes of action against the defendants. *Held*, good, on demurrer, inasmuch as the cause of action was the defendant's negligence, which had been satisfied in the deceased's lifetime, and the death of A. did not create a fresh cause of action.—*Read v. Great Eastern Railway Co.*, Law Rep. 3 Q. B. 555.

ADMINISTRATION—See EXECUTOR AND ADMINISTRATOR.

ADMIRALTY—See SHIP, 2, 3.

ADULTERY—See DIVORCE, 1.

ADVANCEMENT—See POWER, 1.

AGENT—See LANDLORD AND TENANT, 1; MASTER AND SERVANT; PLEDGE, 2; SHIP, 3.

AGREEMENT—See CONTRACT.

ALIEN—See COPYRIGHT.

ALTERATION.

A promissory note expressed no time for payment, and, while it was in the possession of the payee, the words "on demand" were added without the maker's assent. In an action by the payee against the maker, *held*, that as the alteration only expressed the original effect of the note, and was therefore immaterial, it did not affect the validity of the instrument.—*Aldous v. Cornwall*, Law Rep. 3 Q. B. 573.

APPEAL.

1. Where a decree has been made against several defendants, the bill may be dismissed against all the defendants on an appeal by one defendant only.—*Kent v. Freehold Land and Brick-making Co.*, Law Rep. 3 Ch. 493.

2. Where a court of equity has decreed chattels to be delivered up, the execution will not usually be stayed pending an appeal to the House of Lords.—*Harrington v. Harrington*, Law Rep. 3 Ch. 564.

APPORTIONMENT.

An annuity was charged on property, part of which was mining land, settled on A., and part agricultural land, settled on B. The mining land produced a large income, but, being of a fluctuating nature, and liable to great diminution, was valued at seven years' pur-

## DIGEST OF ENGLISH LAW REPORTS.

chase, and the agricultural land at thirty years' purchase. *Held*, that the two properties must contribute in proportion to the actual income *de anno in annum*, and not in proportion to the capitalized value.—*Ley v. Ley*, Law Rep. 6 Eq. 175.

APPROPRIATION—*See* TRUST.

ASSIGNMENT—*See* LANDLORD AND TENANT, 4; PRIORITY, 1, 4.

## ATTORNEY.

1. An attorney, acting as clerk to a firm of attorneys, received the purchase money of certain property, which he appropriated to his own use. He admitted the misappropriation. *Held*, that, though he was not acting strictly in his professional character, yet that the court would exercise its summary jurisdiction and punish the misconduct; and they suspended him for a year.—*Re Hill*, Law Rep. 3 Q. B. 543.

2. An attorney inserted in a deed a false recital as to the consideration, knowing it to be false, and attested the execution of the deed and the receipt of the consideration, knowing that no such consideration had passed or was intended to pass. But no fraudulent use of the deed had been attempted, no fraudulent motive alleged, and no injury occasioned by it. *Held*, that the misstatement was not in itself sufficient to warrant the striking the attorney off the rolls.—*In re Stewart*, Law Rep. 2 P. C. 88.

*See* PARTNERSHIP.

AUCTIONER—*See* FRAUDS, STATUTE OF, 2,

AVERAGE—*See* GENERAL AVERAGE.

BAILEMENT—*See* PLEDGE.

## BANKRUPTCY.

1. A trader gave a bill of sale of his stock in trade to A.; but the bill was not registered. Nine months after, he conveyed by deed all his property, except his furniture and book debts, to a creditor, to secure the same debt and further advances. *Held* (1) that, notwithstanding the reservation, the deed was fraudulent, as it placed the bulk of his property out of the reach of his creditors; and (2) that, being thus fraudulent, it could not be sustained as a substitution for the first bill of sale.—*Ex parte Foxley*, Law Rep. 3 Ch. 515.

2. The plaintiffs were in the habit of drawing bills on Bombay, and handing them to the defendants, London bankers, for collection by the defendants' Bombay branch, the proceeds being remitted to the plaintiffs through the defendants' London house. The plaintiffs executed a deed of inspectorship, under the Bankruptcy Act, 1861, the defendants then having in their hands £3,248 of the plaintiffs, the pro-

ceeds of bills collected in Bombay. At the same date, the plaintiffs were indebted to the defendants in the sum of £3,835. *Held*, that it was a case of mutual credit, within the Bankruptcy Act, 1849, sec. 171, and that the defendants might retain the £3,248 as a set-off.—*Naoroji v. Chartered Bank of India*, Law Rep. 2 C. P. 444.

*See* PRIORITY, 1.

BARRATRY—*See* SHIP, 1.

BILL OF LADING—*See* FREIGHT, 2; SHIP, 1.

BILLS AND NOTES—*See* ALTERATION; BANKRUPTCY, 2; CONFLICT OF LAWS; DISCHARGE.

CAPITAL—*See* APPORTIONMENT.

CARRIER—*See* DAMAGES; RAILWAY, 1; SHIP, 1.

CHEQUE—*See* DONATIO CAUSA MORTIS.

CHILDREN, CUSTODY OF—*See* HUSBAND AND WIFE, 1.

CODICIL—*See* REVOCATION OF WILL.

COLLISION—*See* SHIP, 1.

COMMON CARRIER—*See* CARRIER.

## COMPANY.

1. A company incorporated for the working of collieries contracted with A. to erect a pumping engine and machinery for that purpose, and paid him part of the price. *Held*, that the company could maintain an action against A. for breach of the contract, though the contract was not under seal.—*South of Ireland Colliery Co v. Waddle*, Law Rep. 3 C. P. 463.

2. Directors of a joint-stock company, who neglect its rules, are liable to make good to the shareholders any loss occasioned thereby; their liability in this respect does not differ from that of ordinary trustees.—*Turquand v. Marshall*, Law Rep. 6 Eq. 112.

3. Where the functions of a corporation have ceased, the managers of the corporation are bound to account for all moneys belonging to the corporation, and, when such moneys are improperly retained, to make a decree on the petition of a shareholder on behalf of himself and the other shareholders, for the division of the moneys among them.—*Cramer v. Bird*, Law Rep. 6 Eq. 143.

4. On the 9th of May, the plaintiff, through his brokers, sold shares in a company to the defendants, stock jobbers, the settling day being the 15th of May. On the 10th, the company stopped payment, and the petition for winding up was presented on the 11th. The purchase money was paid by the defendants on the 15th; the certificates of the shares were then delivered by the plaintiff and transfers were executed by him to seventeen persons as nominees of the defendants. The transfers could not be registered on account of the winding up. *Held*, on

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on a bill for specific performance, that the defendants were bound to fulfil the contract, to repay the amount of calls paid by the plaintiff, and to indemnify him against future calls.—*Coles v. Britowe*, Law Rep. 6 Eq. 149.

See MISREPRESENTATION; ULTRA VIRES.

## CONFLICT OF LAWS.

A bill of exchange drawn in France upon and accepted by the drawee in London, was indorsed in blank in France; such indorsement does not, by the law of France, give the indorsee any property in or right to sue on the bill there in his own name. *Held* (per BOVILL, C. J., and WILLES, J.; MONTAGUE SMITH, J., *dis-sentiente*), that the indorsee could not sue the indorser in England.—*Bradlaugh v. De Rin*, Law Rep. 3 C. P. 538.

See DIVORCE, 2; EXECUTOR AND ADMINISTRATOR, 2; FOREIGN COURT.

CONFUSION—See INSURANCE, 2.

## CONTEMPT.

A contempt of court being a criminal offence, no person can be punished for it unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given him.—*In re Pollard*, Law Rep. 2 P. C. 106.

CONTINGENT REMAINDER—See DEVISE.

CONTRACT—See COMPANY, 1, 4; FRAUDS, STATUTE OF; LANDLORD AND TENANT, 4, MISREPRESENTATION; SPECIFIC PERFORMANCE.

CONTRIBUTION—See GENERAL AVERAGE.

## COPYRIGHT.

An alien friend, who, during a temporary residence in a British colony, publishes in the United Kingdom a book of which he is the author, is, under the 5 & 6 Vict. c. 45, entitled to an English copyright.

*Senble* (per Lord CAIRNS, L. C., and Lord WESTBURY; Lords CHILMSFORD, *dubitantibus*), that the protection of the statute is given to every author who first publishes in the United Kingdom, wherever he may be resident.—*Routledge v. Low*, Law Rep. 3 H. L. 100.

CORPORATION—See COMPANY.

CRIMINAL LAW—See CONTEMPT.

CRUELTY—See DIVORCE, 1.

CUSTODY OF CHILDREN—See HUSBAND AND WIFE, 1.

CUSTOM—See PRESCRIPTION.

## DAMAGES.

The plaintiffs delivered to the defendant's servants, for shipment on the defendant's vessel, several cases containing machinery, intended for the erection of a saw-mill at Vancouver's Island. The defendant knew generally of what

the shipment consisted. On the arrival of the vessel at her destination, one of the cases, containing machinery, without which the mill could not be erected, could not be found, and the plaintiffs were obliged to send to England to replace the lost articles. *Held*, that the measure of damages for the breach of contract was the cost of replacing the lost articles in Vancouver's Island, with interest at five per cent on the amount till judgment, but that the plaintiffs were not entitled to compensation for loss of profits sustained whilst the mill, by reason of the loss, remained idle.—*British Columbia Saw-mill Co. v. Nettleship*, Law Rep. 3 C. P. 499.

## DESERTION.

A husband who withdraws from cohabitation with his wife may be guilty of desertion, though he continues to support her.

Reasonable cause for desertion is not necessarily a distinct offence, on which a decree of separation or dissolution could be founded, but it must be grave and weighty. Mere frailty of temper is not sufficient.—*Yeatman v. Yeatman*, Law Rep. 1 P. & D. 489.

## DEVISE.

A testator held two estates, A. and B.,—A. under a lease for lives renewable for ever, and B. in fee. In 1833, he made a will, in which he said, "I devise and bequeath to my son all those my property, lands, and premises at A.," together with plate, furniture, &c. "I also devise and bequeath to my son my lands and premises at B." All his estates were charged with an annuity to his wife. A codicil provided that if the son should die without heirs of his body, in that case, and in default of such heirs, the lands at A., and the plate and furniture, all charged with the annuity to the wife, and also with a reasonable provision for the son's wife, should, at the son's death, descend to D. C., his heirs, &c., for ever. In the event of the death of the son without heirs, a charge was created in favour of a married daughter. The son died, never having had a child. *Held*, that the son had an estate in the nature of a fee simple, with an executory devise over to D. C. in the event that happened of the son dying without heirs of the body living at his death; and that, in B., the son had an estate for life or in tail, with a contingent remainder to D. C. in the same event.—*Coltman v. Coltman*, Law Rep. 3 H. L. 121.

See HEIRLOOM; LEGACY DUTY; VESTED INTEREST.

DIRECTORS—See COMPANY, 2, 3.

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## DISCHARGE.

A discharge of joint debts discharges the separate liability of the debtors on a joint and several note given to secure a joint debt (per BYLES, KEATING, and MONTAGUE SMITH, JJ.; BOVILL, C. J., *dissentiente*).—*Rixon v. Emary*, Law Rep. 3 C. P. 546.

## DIVORCE.

1. A wife petitioned for judicial separation on the ground of cruelty; the court found the charges not proved, and dismissed the petition. *Held*, that she was estopped from setting up the same charges of cruelty, coupled with a charge of adultery, in a subsequent petition for dissolution.—*Finney v. Finney*, Law Rep. 1 P. & D. 483.

2. A., an Englishwoman, married B., a Belgian, in Scotland. They afterwards went through a second ceremony of marriage in Belgium. Subsequently, a Belgian tribunal pronounced a decree of divorce, purporting to dissolve the Belgian marriage, but not purporting to affect the Scotch marriage. A. afterwards married C. in England, in the lifetime of B. *Held*, that the Scotch marriage was valid and subsisting; and, on the petition of C., the court declared his marriage with A. null and void.—*Birt v. Boutiner*, Law Rep. 1 P. & D. 487.

*See* DESERTION.

## DONATIO CAUSA MORTIS.

The delivery of the donor's cheque on his banker, which was not presented before the donor's death: *held*, not a good *donatio causa mortis*.—*Hewitt v. Kaye*, Law Rep. 6 Eq. 198.

EASEMENT—*See* WAY.

EQUITY—*See* PARTNERSHIP.

EQUITY PLEADING AND PRACTICE—*See* APPEAL; MISREPRESENTATION; WAY, 2.

ESTATE TAIL—*See* MARRIAGE SETTLEMENT.

ESTOPPEL—*See* DIVORCE, 1.

EVIDENCE—*See* FRAUDS, STATUTE OF, 1; INTERROGATORIES; PRESCRIPTION,

EXECUTION—*See* APPEAL, 2.

## EXECUTOR AND ADMINISTRATOR.

1. A testator, owning shares in a company with unlimited liability, directed his executors to convert his estate with all convenient speed. P., one of the three executors, died a year and five weeks after the testator. The shares were not converted. *Held*, that P.'s estate was liable for all loss occasioned to his testator's estate by the failure to convert within twelve months.—*Grayburn v. Clarkson*, Law Rep. 3 Ch. 605.

2. Where the nomination of the executor of a person who has died domiciled in Scotland

has been confirmed in the Court of Probate, as provided by 21 & 22 Vict. c. 56, sec. 12, the executor has all the powers of an English executor, and may dispose of leaseholds in England; though, by the law of Scotland, an executor cannot deal with leasehold property in that country.—*Hood v. Lord Barrington*, Law Rep. 6 Eq. 218.

*See* FRAUDS, STATUTE OF, 2.

EXECUTORY DEVISE—*See* DEVISE.

## FIXTURES.

A steam-engine and boiler, annexed to the freehold for the more convenient use of them, and not to improve the inheritance, and capable of being removed without any appreciable damage to the freehold, pass under a mortgage of the freehold.—*Climie v. Wood*, Law Rep. 3 Ex. 257.

## FOREIGN COURT.

A British ship, mortgaged in England, was arrested at New Orleans by creditors of the mortgagor, who were British subjects resident in England; and, as the courts of New Orleans do not recognize the rights of mortgagees not in possession, the mortgagees, to protect the ship from sale, gave bonds for the amount claimed by the creditors. On a bill by the mortgagees to restrain a suit on these bonds, *held*, that, though the decisions of the New Orleans courts might be unjust, yet, as the creditors owed no duty to the mortgagees, and had a right to proceed against the property of their debtor, wherever they found it, the bill could not be maintained.—*Liverpool Marine Credit Co. v. Hunter*, Law Rep. 3 Ch. 479.

*See* DIVORCE, 2.

## FRAUDS, STATUTE OF.

1. A tenant applied to the landlord's solicitors for a renewal of his lease. The solicitors sent him a report by a surveyor, recommending the grant of a lease for fourteen years at a given rent, if the tenant would make certain repairs. The tenant replied, assenting to the repairs and rent, but asking for a term of twenty-one years. No agreement was come to; but, some months after, the landlord and tenant having negotiated directly, the landlord wrote to the tenant, promising him a lease for fourteen years "at the rent and terms agreed on." The tenant accepted in writing. *Held*, that parol evidence was admissible to connect the report and the tenant's previous letter with the subsequent letters; and it being proved that there had been no other rent or terms agreed on than those mentioned in the report, the case was taken out of the Statute of Frauds.—*Baumann v. James*, Law Rep. 3 Ch. 508.

## DIGEST OF ENGLISH LAW REPORTS.

2. The memorandum of sale of a leasehold house stated that it was the property of A., deceased, and that the sale was by direction of the executors, not naming them, and was signed by the auctioneer, as agent "for the vendors." A. was a domiciled Scotchman, and had, by will, named seven persons, and the acceptors of them, as executors. Two only accepted office, and confirmation was granted to them in the English Court of Probate subsequently to the contract of sale. *Held*, that the contract was valid, and specific performance was decreed.—*Hood v. Barrington*, Law Rep. 6 Eq. 218.

FRAUDULENT CONVEYANCE—*See* BANKRUPTCY, 1.

## FREIGHT.

1. A mortgagee of a vessel intervening by taking possession, or, when that is impossible, by giving notice to the mortgagor and the charterers, before the freight is payable, though after it is earned, is entitled to the freight as against the assignee in bankruptcy of the mortgagor. (BRAMWELL, B., *dissentiente*.)—*Rusden v. Pope*, Law Rep. 3 Ex. 269.

2. F., a ship owner at L., requested the defendants to purchase goods for him at C., to be shipped on board his ship, which was then on its way to C., consigned to the defendants; and, as the goods were to be shipped on owner's account, he consented to a nominal rate of freight being inserted in the bill of lading. Before the execution of the order, the ship was transferred to the plaintiff. The defendants, having no notice of the transfer, executed the order, and put the goods on board the ship; the master—who also had no notice of the transfer—signing bills of lading to the defendants' order, "Freight for the said goods free on owner's account." Before the arrival of the ship at L., F. stopped payment, and the defendants claimed to stop the goods *in transitu*. On her arrival, the plaintiff took possession and claimed freight. On a case stated, *held*, that the plaintiff was not entitled, as against the defendants, to freight, or a sum equal to freight, for the carriage of the goods.—*Mercantile Bank v. Gladstone*, Law Rep. 3 Ex. 233.

*See* INSURANCE, 1; PRIORITY, 4.

## GENERAL AVERAGE.

A ship sailed from L. for C. with 2,000 tons of salt. The day after she sailed, the ship struck on a bank, and, after throwing overboard 1,000 tons of the salt, was got off, and got back to L., where the remainder of the salt was unloaded, and was found to be badly damaged. The charterer had paid freight in advance. In an action by the ship owner against

an underwriter, to recover a general average contribution in respect of the salt jettisoned, on a case stated for the opinion of the court as to the principle by which the average-stater was to be guided in ascertaining the value of the jettisoned goods: *held*, that the salt jettisoned was to be valued at the price which it would have been worth at L., if brought back there, taking into account the probability of its arriving there in a sound or a damaged state, or in a state in which it could have been forwarded, so as to take advantage of the prepaid freight.—*Fletcher v. Alexander*, Law Rep. 3 C. P. 375.

GENERAL WORDS—*See* STATUTE, REPEAL OF.

GUARANTY—*See* LANDLORD AND TENANT, 2.

## HEIRLOOM.

A testator gave chattels to trustees, in trust for the persons who for the time being should, under the limitations of a settlement, be in actual possession of certain estates, to the end that the chattels might be deemed heirlooms, to go along with the said estates so far as the rules of law or equity would permit; but so, nevertheless, as that the chattels should not, for the purpose of transmission, vest absolutely in any person who, under the settlement, should become seized of the estates for an estate of inheritance, unless such person should attain twenty-one, or, dying under age, should leave issue inheritable under the settlement. The first tenant in tail, in possession under the settlement, died without issue, under twenty-one. *Held*, that the estate of the first tenant in tail was thereby terminated, but that there were no words which carried over the chattels in that event to any other tenant for life or in tail, and that therefore the chattels passed by a residuary clause in the will.—*Harrington v. Harrington*, Law Rep. 3 Ch. 564.

HIGHWAY—*See* WAY, 2.

## HUSBAND AND WIFE.

1. A woman, living for sufficient cause apart from her husband, had living with her their child, against her husband's will; the court having given her the custody. She had no adequate means of support. *Held* (COCKBURN, C. J., *dissentiente*), that she had authority to pledge her husband's credit for the reasonable expenses of providing for the child.—*Bazeley v. Forder*, Law Rep. 3 Q. B. 559.

2. A man covenanted to pay a woman an annuity for her life, payable half-yearly, for her separate use, and free from anticipation. He afterwards married her, and died leaving her surviving. *Held*, that the annuity was not extinguished, but only suspended, by the mar-

## DIGEST OF ENGLISH LAW REPORTS—GENERAL CORRESPONDENCE.

riage.—*Fitzgerald v. Fitzgerald*, Law Rep. 2 P. C. 83.

3. The defendant received money for the use of a married woman, and he wrote to her that he held the money at her disposal. The woman's husband survived her, and died, never having interfered as to the money. *Held*, that the wife's representative, and not the husband's, was the proper party to sue for the money.—*Fleet v. Perrins*, Law Rep. 3 Q. B. 536.

See DESERTION; DIVORCE; MARRIAGE SETTLEMENT; POWER, 1, 3.

INCOME—See APPORTIONMENT.

INJUNCTION—See RAILWAY, 2; WAY, 2.

## INSURANCE.

1. The owner of a vessel chartered to sail from A. to B. with cargo, and there discharge, thence to proceed to C., load cargo, and proceed to D., insured the chartered freight to be earned on the voyage from C. to D., but only against perils incurred on the voyage from A. to B. The vessel, on the voyage to B., recived such injuries as would have justified abandonment or sale at B., but neither took place within a reasonable time, and the owner partially repaired the vessel at B., and sailed it to B., where it was destroyed. No notice of the abandonment of the freight was given in a reasonable time. *Held*, that there was neither an actual nor a constructive loss of the freight within the policy.—*Potter v. Rankin*, Law Rep. 3 C. P. 562.

2. Cotton of different owners was shipped in bales, specifically marked at M. for L. Forty-three bales belonged to the plaintiffs, and were insured by the defendants against the usual perils. The ship was wrecked near Key West, some of the cotton was lost, and all was damaged,—some so much so that it had to be sold at Key West. The rest was brought in another vessel to L. The marks on many of the bales were so obliterated by sea-water that none of the cotton lost or sold at Key West, and a part only of that brought to L., could be identified. Two only of the plaintiffs' bales were identified, and these were delivered to them. *Held*, that, in respect to the cotton lost and that sold at Key West, there was a total loss of a part of each owner's cotton, and that all the owners became tenants in common of the cotton which arrived at L. and could not be identified: the share of each owner's loss in the cotton totally lost or sold, and his share in the remainder which arrived at L., being in the proportion that the quantity shipped by him bore to the whole quantity shipped; and therefore that there was neither an actual nor

constructive total loss of the plaintiffs' forty-one bales.—*Spence v. Union Marine Insurance Co.*, Law Rep. 3 C. P. 427.

See GENERAL AVERAGE; STOPPAGE IN TRANSITU.

## INTERROGATORIA.

1. An office copy of answers to interrogatories made in a former suit by a party to an action is admissible in evidence against him, without putting in the interrogatories, or proving the party's signature to the original answers.—*Fleet v. Perrins*, Law Rep. 3 Q. B. 536.

2. In an action for malicious arrest against a municipal corporation, the plaintiff was allowed (*MARTIN, B., dubitante*) to interrogate the town clerk whether he caused the plaintiff to be arrested. *Semble*, that any interrogatory may be put which is material, *bona fide*, and not scandalous, and any objection to answering is to be taken at the stage of answering, and under the oath of the interrogated party.—*McFadden v. Mayor, &c., of Liverpool*, Law Rep. 3 Ex. 279.

JOINT AND SEPARATE DEBT—See DISCHARGE.

## GENERAL CORRESPONDENCE.

*The right of Attornies to fees in Division Courts.*

TO THE EDITORS OF THE CANADA LAW JOURNAL.

GENTLEMEN,—A correspondent signing himself "J. T." in your January number, has undertaken to explain away, and give the particulars of one of the cases tried in a Division Court, before a certain County Judge, as detailed by me in your December number, 1868. Your correspondent apparently knows nothing of the facts of the case alluded to by him,—if he does he mistakes them.

It is true, as he says, that I had been retained to attend to a suit before the judge in question at a country town, but I made no allusion to that suit, for my bill of costs had no relation to the first retainer or business done therein, which had ended and been paid for before the second retainer. The retainer on which I brought my suit was given afterwards, a written one, not ambiguous at all, and the judge founded his judgment upon it, as he said at the time, not upon any other evidence. All my evidence before the judge was written evidence and could not be misunderstood. In my letter I had no intention to accuse and did not accuse the judge of any improper motive. I

## GENERAL CORRESPONDENCE.

do not think him capable of anything of the kind; nor did I suppose it possible that he could have any enmity to me, since we always have been upon the best of terms. If I am to suppose any thing against him, it would be a mistaken view not only of the law, but of the equity of the two cases and the facts in evidence. There were two cases to which I alluded in my letter, decided by the judge at different courts; and in deciding the last case, he took occasion to say *he decided it upon the same principle as the first*. The principle I supposed to have been in his mind was, that an attorney has no right to recover in his court for attendances, letters and affidavits written, and arguments before a judge in new trial cases. Therefore if he gave judgment upon some principle, upon what principle did he give it? Certainly it must have been given for work done as an attorney, and not as a mere labourer—and if as an attorney, why strike off proved attorney's work, or allude to some principle in his mind of deciding attorneys' cases? The case now in question to which "J. T." alludes was brought by me upon a written retainer filed in the court, *as explicit as it could be*—for applying upon special affidavits for a new trial, in which important law points were involved, and where the amount sued for was about \$100.

It was necessary for me to make out a brief, and put down cases in point (the brief itself was worth \$4), and the judge looked over it and it is filed among the papers. The judge knew that I went out on the train to a country town to argue the case, and spent most of the day to do so; and when he tried the case, he had before him the affidavit of a barrister (the county attorney of his county), swearing that my services in going out, &c., were worth \$7. Yet in this case, setting aside all attendances, letters and affidavits, the judge only allowed me \$6, not even that which the barrister swore I was entitled to for arguing the case. Now I have a copy of the bill presented before the judge, every item of which was fairly proved. Here it is:—

1868, May 6.	£	s.	d.
Letter, &c., to client, and attendance about result of arbitration.....	0	2	6
Instructions to apply for new trial (on new retainer).....	0	5	0
Drawing affidavit of client of facts of case 2s. 6d., copy 1s. 3d.....	0	2	9

Drawing my affidavit (special) of facts and for new trial 5s., copy 2s. 6d., attending to swear and paid 2s. 3d.	0	9	9
Letter forwarding, same to——, to have served and attendance.....	0	2	6
Paid postage.....	0	0	7½
Affidavit of service of affidavits drawn	0	2	6
Attending at——to see that—— had served the affidavits.....	0	1	3
Telegraph to——paid 1s. 3d., attendance 1s. 3d.....	0	2	6
Attendance and argued case at—— argued for the defendants, and expense to the country and back to——	1	15	0
Writing a letter to client of result of new trial, and attendance, notifying him.....	0	2	6
Also writing to his brother, his agent, &c.....	0	2	6
	£3	19	4

I purposely leave all names and places in blank.

There is not an item in this bill to which I am not fairly entitled. It may be a question whether the letters should be with attendance more than 1s. 3d. But some items are omitted, and under all the circumstances considering the small sum I charge for going into the country, and that my application for a new trial was successful, the judge should have allowed the whole bill. Then he had before him an affidavit in which a barrister and county attorney of his county, swears thus:—

That —— in this suit acted as counsel for the within defendant in that suit, and the within defendant stated to me he had retained or employed him to do so.

That in my opinion *seven dollars would be a reasonable fee* for counsel going from —— to ——, and arguing an application for a new trial there, &c."

The judge read the affidavit, and took it as regularly before him. Urgent business kept the county attorney at home, but the affidavit was not objected to on that ground. All the original papers and affidavits were before the judge. He knew of the difficult argument and that I had to expend in serving bills and going to sue, certainly at least \$4; yet all he gave me was \$6. What attorney would go into court under such circumstances? I would not have sued in the judge's court at all, if the cause of action having arisen there, had not obliged me to do so.



## GENERAL CORRESPONDENCE.—REVIEWS.

Now I again repeat that the judge admitted that he was bound by the written retainer; and although "J. T." wished to confound my first employment with the last, the judge told him the *evidence proved the contrary*, and he did not give his judgment upon any such views put forward by "J. T."

"J. T." is pleased to say that the judge in question is a young man and beloved in his county. That is not the question however; I am not dealing with character, age or position in this matter. The profession has rights as well as the judge, and it would be well for all judges to remember, that like me and many others, they and their families once depended on the fair earnings of their profession for a livelihood.

I believe in judges protecting lawyers in those rights. It is all very well for people to talk of the great fees and earnings of lawyers, but every man knows, who has looked thoroughly into it, that taking education, study, talents, and time into account, no profession upon the whole is worse paid than that of the law. There may be a few law firms that make money, but how many are there who deserve better things, who only make a "bare annual living?"

My letter of December was not written alone for myself, but for the rights of a learned body of men, who ought to be fairly and equitably paid by those who employ them, and who have a right to expect better treatment from judges than I have received from the one who "dealt out lame equity" to me.

AN ATTORNEY.

February 9, 1869.

[We speak of the subject matter of this in another place. Our correspondent also alludes to another suit in which he was allowed only \$1, but we have given more space to these matters than we can well afford, and it is only because they are of some interest, as to the question of what fees attorneys should be allowed for Division Court services that we insert them at all.—Eds. L. J.]

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—In August, 1864, I was articulated, and in Hilary Term, 1865, was admitted into the Law Society.

It will, therefore, not be necessary for me to pass either of the two extra examinations

as articulated clerk, and only the last of the two as Student-at-Law.

At the foot of the list of books prescribed by the Law Society for the second examination is a memorandum, to the effect, that the students will be re-examined in subjects and books of the first examination.

The question arises, will I, who will not be required to pass the first examination be examined in the books and subjects of it.

By kindly giving your opinion on this point in the next issue of the *Law Journal* you will very much oblige the writer as well as many others similarly situated.

Yours very truly,

London, Nov. 19, 1868.

A STUDENT.

## REVIEWS.

THE FIRST BOOK OF THE LAW. By Joel Prentiss Bishop. Boston: Little, Brown & Co. 1868.

This book is by the author of some excellent works, well known to our readers, which treat of "Criminal Law," "Criminal Procedure," and "The Law of Marriage and Divorce." It is intended as an explanation of the nature, sources, books and practical applications of legal science, and methods of study and practice.

It is all that the title page promises, and much more, and contains a great deal that will be useful to those who perhaps think themselves above any assistance or information that can be derived from such an avowedly elementary work.

The object of the work is, as is set forth in the preface:—

"First, to enable all young persons to decide for themselves the question, whether the law offers to them the pursuit for life which is best adapted to their natural capacities and tastes; secondly, to teach all, who may choose to read it, something concerning the nature of the law, how it has come to us, what is legal authority, and so on, in order to qualify them the better to discharge the duties of citizens in a free republic; thirdly, and chiefly, to teach the student of the law how to study it, and to furnish him with various incidental helps in the study. It is not written upon the plan of teaching a little law upon every legal topic, therefore of necessity conveying to the mind of the young reader no really correct and perfected image of any thing; but its object is to prepare the way for a thorough and profound study of the law,

## REVIEWS—CHANCERY SPRING SITTINGS.

viewed both as a science and an art, in other books."

The work is divided into four parts:

I. The preparation necessary for law studies, treating of physical capacity, mental aptitude, moral aptitude, and preparatory studies and training; containing much useful advice, which, if acted upon, would save many a young man from entering a profession wholly unsuited to his capacity or his inclinations.

II. The nature of law in general, and of the Common Law in particular, giving a comprehensive view of the foundation on which the laws rest.

III. The sources of legal authority, the author coming now to the consideration of the more practical part of his work, and discussing his subjects in this and the next part with those who have made up their minds to go to work at their studies in earnest, telling them where to look for information, and the respective value of different sources of knowledge.

IV. This part goes a step further, and teaches the student where to study, the book he should read, the field of legal acquisition, what is to be learned besides books, and practical directions for learning how and where to find things—invaluable knowledge, second only to the knowledge itself, and a necessary practical adjunct to such knowledge.

The work concludes with an alphabetical list of names and abbreviations of text books and reports, with their dates, and some observations respecting the qualities and histories of particular books, a table of inestimable advantage, as will be sufficiently obvious both to the student and to the practitioner, information which can nowhere else be found in such a compact, though full and accessible shape.

Everything in this book shows the downright earnestness of a man fully impressed with the dignity of his profession, and with a desire that all who follow it should do so with their hearts in the work, and with a high sense of the moral attributes that should pervade its votaries.

The observations of the author evince much shrewdness and originality, combined often with a curious quaintness not often seen in books in the nineteenth century. This quaintness has in some measure gone the length, though without any thought of such thing in the mind of the author, of a species of irreverence, or rather of an unnecessary allusion to sacred things, far-fetched and fanciful, and somewhat out of place.

Warren's Law Studies has been a favourite book with students for many years, but for our part, and especially in this country, we are inclined to think that the book before us is the most readable and the most instructive, and we strongly recommend our readers to read it for themselves, students particularly.

Even after the sound advice contained in it has been digested, there is still left in it sufficient practical information to make it a valuable addition to the lawyer's library.

It can easily be obtained by writing direct to Messrs. Little, Brown & Co., the enterprising law publishers of Boston, or it may be ordered from them through any bookseller.

## CHANCERY SPRING SITTINGS.

*The Hon. Vice-Chancellor Spragge.*

Toronto .....	Tuesday .....	Mar. 16.
Goderich .....	Thursday .....	April 8.
Stratford .....	Monday .....	April 12.
Sarnia .....	Friday .....	April 16.
Sandwich .....	Tuesday .....	April 20.
Chatham .....	Friday .....	April 23.
London .....	Friday .....	May 7.
Woodstock .....	Thursday .....	May 13.
Simcoe .....	Tuesday .....	May 18.

*The Hon. The Chancellor.*

Guelph .....	Tuesday .....	April 6.
Brantford .....	Tuesday .....	April 13.
St. Catharines .....	Friday .....	April 16.
Hamilton .....	Tuesday .....	April 20.
Whitby .....	Tuesday .....	April 27.
Barrie .....	Tuesday .....	May 4.
Owen Sound .....	Tuesday .....	May 18.
Cobourg .....	Wednesday .....	May 26.

*The Hon. Vice-Chancellor Mowat.*

Ottawa .....	Tuesday .....	April 27.
Cornwall .....	Friday .....	April 30.
Brockville .....	Friday .....	May 7.
Kingston .....	Tuesday .....	May 18.
Belleville .....	Friday .....	May 21.
Peterboro' .....	Friday .....	May 28.
Lindsay .....	Monday .....	May 31.

## SPRING CIRCUITS, 1869.

## EASTERN CIRCUIT.

*The Hon. Mr. Justice Morrison.*

Kingston .....	Tuesday .....	Mar. 16.
Brockville .....	Wednesday .....	Mar. 24.
Perth .....	Tuesday .....	Mar. 30.
Ottawa .....	Tuesday .....	April 13.
L'Orignal .....	Tuesday .....	April 27.
Cornwall .....	Monday .....	May 3.
Pembroke .....	Tuesday .....	May 11.

## SPRING SITTINGS—APPOINTMENTS TO OFFICE.

## MIDLAND CIRCUIT.

*The Hon. Mr. Justice A. Wilson.*

Napanee .....	Wednesday ...	Mar. 17.
Belleville .....	Monday .....	Mar. 22.
Cobourg .....	Monday .....	April 5.
Whitby .....	Tuesday .....	April 13.
Peterborough .....	Tuesday .....	April 20.
Lindsay .....	Tuesday .....	April 27.
Pictou .....	Tuesday .....	May 4.

## NIAGARA CIRCUIT.

*The Hon. The Chief Justice of the Common Pleas*

Hamilton .....	Monday .....	Mar. 15.
Welland .....	Tuesday .....	Mar. 30.
St. Catharines .....	Monday .....	April 5.
Barrie .....	Monday .....	April 12.
Milton .....	Tuesday .....	April 27.
Owen Sound .....	Monday .....	May 10.

## OXFORD CIRCUIT.

*The Hon. The Chief Justice of Ontario*

Stratford .....	Tuesday .....	Mar. 30.
Berlin .....	Tuesday .....	April 6.
Guelph .....	Monday .....	April 12.
Woodstock .....	Monday .....	April 19.
Brantford .....	Monday .....	April 26.
Cayuga .....	Tuesday .....	May 4.
Simcoe .....	Tuesday .....	May 11.

## WESTERN CIRCUIT.

*The Hon. Mr. Justice John Wilson.*

Sarnia .....	Tuesday .....	Mar. 16.
Goderich .....	Tuesday .....	Mar. 23.
London .....	Tuesday .....	Mar. 30.
St. Thomas .....	Thursday .....	April 8.
Chatham .....	Tuesday .....	April 18.
Sandwich .....	Tuesday .....	April 20.
Walkerton .....	Tuesday .....	May 11.

## HOME CIRCUIT.

*The Hon. Mr. Justice Gwynne.*

Brampton .....	Tuesday .....	Mar. 16.
City of Toronto .....	Monday .....	April 5.

## APPOINTMENTS TO OFFICE.

## NOTARIES PUBLIC.

WALTER HOYTFFUTTEN, of the Town of Guelph, Esq., Barrister-at-Law. (Gazetted July 25, 1868.)

MORGAN CALDWELL, of Walkerton, Esquire, Barrister-at-law. (Gazetted September 12, 1868.)

JAMES DAVID EDGAR, of Osgoode Hall, Barrister-at-Law. (Gazetted September 19, 1868.)

EDWARD H. TIFFANY, of the City of Hamilton, Gentleman, Attorney-at-Law. (Gazetted September 26, 1868.)

EBENEZER W. SCANE, of the Town of Chatham, Gentleman, Attorney-at-Law. (Gazetted Oct. 17, 1868.)

WILLIAM WELLAND BERFORD, of the Town of Perth, Gentleman, Attorney-at-Law. (Gazetted October 24, 1868.)

JOHN MORISON GIBSON, of the City of Hamilton, Esquire, Barrister-at-Law. (Gazetted October 31, 1868.)

JOHN MUDIE, of City of Kingston, Esquire, Barrister-at-law. (Gazetted November 7, 1868.)

GEORGE PETER LAND, of the City of London, Esq., Barrister-at-Law. (Gazetted November 14, 1868.)

WILLIAM BARCLAY McMURRICH, of the City of Toronto, Esquire, Barrister-at-Law; JOHN McLEAN, of the Town of St. Thomas, Esquire, Barrister-at-Law; and ROBERT GRAHAM, of the Village of Enterprise, Gentleman. (Gazetted November 21, 1868.)

DALTON MCCARTHY, Jun., of the Town of Barrie, Esquire, Barrister-at-Law; ROBERT CASSELS, Jun., of the City of Toronto, Barrister-at-Law; FREDERICK BISCOE, of the Town of Guelph, Esquire, Barrister-at-Law; ROBERT R. WADDELL, of the City of Hamilton, Gentleman, Attorney-at-Law, and ROBERT HICK, Jun., of the City of Ottawa, Gentleman, Attorney-at-Law. (Gazetted November 28, 1868.)

JAMES EDWIN O'REILLY, of the City of Hamilton, Gentleman, Attorney-at-Law. (Gazetted Dec. 12, 1868.)

JOSEPH JAMIESON, of the Village of Almonte, Gentleman, Attorney-at-Law. (Gazetted December 19, 1868.)

CHARLES ROBERT HORNE, of Windsor, Esquire, Barrister-at-Law. (Gazetted January 9, 1869.)

JOHN PAUL CLARK, of Brampton, Gentleman, Attorney-at-Law. (Gazetted January 23, 1869.)

## ASSOCIATE CORONERS.

JOHN PHILLIP JACKSON, Esquire, M.D., for the County of Perth. (Gazetted August 1, 1868.)

JAMES McLAREN WALLACE, of the Village of Spenceville, Esquire, M.D., for the United Counties Leeds and Grenville. (Gazetted August 22, 1868.)

JAMES PATRICK FOLEY, Esquire, M.D., for the County of Ontario. (Gazetted September 5, 1868.)

JAMES WATERFORD STUART, of Port Dover, and WILLIAM HENRY MILLER, of Victoria, Esquires, M.D., for the County of Norfolk, and JONATHAN McCULLY, of the Township of Howard, M.D., for the County of Kent. (Gazetted September 19, 1868.)

CHARLES DOUGLASS, of the Town of Streetsville, Esquire, M.D., for the County of Peel. (Gazetted October 24, 1868.)

WILLIAM K. KERR and THOMAS WEBSTER, of the Town of Brantford, Esquires, for the County of Brant. (Gazetted October 31, 1868.)

JAMES MCBRIDE WOODS, of the Village of Streetsville, Esquire, M.D., for the County of Peel. (Gazetted December 5, 1868.)

JOHN COVENTRY, of the Village of Wardsville, and DANIEL CLINE, of Belmont, Esquires, M.D., for the County of Elgin. (Gazetted December 19, 1868.)

WILLIAM F. ROOME, of the Village of Newbury, and JOSEPH MOTHERSILL, of the Village of Strathroy, Esquires, M.D., for the County of Middlesex. (Gazetted December 19, 1868.)

JOHN MUIR, of the Township of Wolford, Esquire, M.D., for the United Counties of Leeds and Grenville. (Gazetted December 19, 1868.)

JOHN F. HICKS, of the Village of Duart, Esquire, M.D., for the County of Kent. (Gazetted Dec. 19, 1868.)

WILLIAM CHARLES HAGERMAN, of Lyndock, Esq., M.D., for the County of Norfolk. (Gazetted Jan. 9, 1869.)

JOHN O'SULLIVAN and ROBERT KINCAID, of the Town of Peterborough, Esquires, M.D., for the County of Peterborough. (Gazetted January 16, 1869.)

ROBERT J. SLOAN, of Wingham, Esquire, M.D., for the County of Huron. (Gazetted January 16, 1869.)

The Rev. Mr. Mackonochie appears to have caused much indignation in the minds of some of our contemporaries by not having made any change in the ceremonial of his services since the recent decision of the Privy Council, and it has been stated that he has by his conduct been guilty of "contumacy." In fact, however, he has not been acting in the slightest degree contrary to law. The so-called "judgment" of the Judicial Committee is really no judgment at all. It is simply a statement of the reasons on which the Court base their report to the Queen. The report itself, again, has no binding authority until it has been submitted to Her Majesty in council for approval, and has been embodied in an order in council. When these steps have been taken, but not before, the report becomes a judgment in the ordinary sense of the term, and it must then be obeyed accordingly. The consequences of disobedience would be an attachment for contumacy and contempt, and the infliction of such a punishment as the Court of Arches might in its discretion deem proper.

## LAW REFORM ACT OF 1868—PROFESSIONAL HUCKSTERING.

## DIARY FOR MARCH.

1. Mon.. *St. David.* Last day for notice of trial for Co. Court York. Sub-Treasurers of school moneys to report to County Auditor.
7. SUN. *4th Sunday in Lent.*
9. Tues General Sessions and County Court sittings in County York.
14. SUN. *5th Sunday in Lent.*
17. Wed. *St. Patrick's Day.*
21. SUN. *6th Sunday in Lent.*
25. Thur. *Lady Day.*
26. Fri.. *Good Friday.*
28. SUN. *Easter Sunday.*
29. Mon.. *Easter Monday.*

THE

## Canada Law Journal.

MARCH, 1869.

## LAW REFORM ACT OF 1868.

As our readers are aware, it is enacted by one of the clauses of this Act, (section 18, sub-section 2), that a party to a suit who desires his case to be tried by a jury must give notice in writing to that effect to the Court and to the opposite party, by filing the same with his last pleading, and serving a copy on his opponent. Now it very often happens, that a party does not know, and cannot know until issue is finally joined, what pleading will be his last. Must therefore a plaintiff, to make sure, serve this notice with his replication, or the defendant begin serving it with his plea, supposing the pleadings to go beyond these stages respectively; or, if he omits to give the notice with what eventually turns out to be his last pleading, has he lost his chance of having a jury? The affirmative was strongly urged in a late case in Chambers which we now propose to notice.

In the case referred to, however, *The Quebec Bank v. Grey* a different mode was adopted to meet the difficulty. The action was brought on a promissory note, to which the defendant pleaded a special equitable plea; to this, the plaintiff replied by taking issue on it. The defendant desired to have a jury, but had failed to give the necessary notice along with his plea. He therefore joined issue on the replication, and filed and served his notices with this his "last pleading;" thus galvanizing into life, as it were, the old similitur, which the plaintiff afterwards contended was done away with by the Common Law Procedure Act.

The plaintiff, thereupon, obtained a summons to strike out this pleading, joinder of issue,

similitur—or whatever it might be called—and to set aside the notice for trial by jury. This summons was fully argued before the Chief Justice of the Common Pleas, who decided that the defendant had a right to use this similitur, which was held to be still in existence and in fact preserved by sec. 108 of the Common Law Procedure Act.

It may now, therefore, be considered as settled, until at least this decision is impugned, that a party to a suit, may, for the purpose of giving a notice for a jury under the section referred to, file and serve a similitur, or formal joinder of issue, whether or not, the previous pleading is one in denial, and though such joinder of issue, under the practice in force since the Common Law Procedure Act, is for the purpose of perfecting the issue on the Record, unnecessary. This decision, may perhaps, take some by surprise, but it is, we apprehend, the correct ruling, and as the practice it authorises is certainly the most convenient under the circumstances, it is likely to be followed.

On the other hand, the Chief Justice set aside a notice for a jury which had not been served with a "last pleading," but he allowed the party to withdraw and re-file, and reserve such pleading, so as to bring himself within the act, and enable him to give the necessary notice with his last pleading.

## PROFESSIONAL HUCKSTERING.

It is to be expected that those persons who, are, unfortunately, allowed in this Country to trespass on the domain of the profession in the way of conveyancing, &c., should attempt to attract customers by devices in the advertising line that would do credit to the genius of "Brown, Jones & Robinson," and should vie with each other in doing business on the most "cheap and nasty" scale. But it should be a matter of surprise and regret that a member of that very profession should follow their example, and put himself on a par with those who attempt to make a living out of the credulity or cupidity of the unwary.

We have been furnished with a copy of a printed circular, or "Tariff of conveyancing charges," distributed by a member of the Law Society in a city to the east of this, which is unique in its way, and whilst it evinces the

## PROFESSIONAL HUCKSTERING—THE HIGH SHERIFF.

want of a proper feeling on the part of the compiler, leads one to suppose that if his capacity is to be taken at his own figures, it must be excessively limited; for example, this learned gentleman thinks that his searching or advising on a title is worth only "\$1.25;" possibly that is enough for it, perhaps too much. But it is not the mere fact of his charging such sums as these for professional services that is so objectionable; the whole thing is foreign to the tradition of the profession, and to the rules and etiquette which should guide it. The individual would probably be gratified by an advertisement gratis, but it is best not to accommodate him. We trust that he will take the hint, and not continue his little effort to reduce the emoluments of a profession already miserably under paid.

We have been requested to call attention to a circular issued to subscribers by Mr. Leggo, with reference to his work on "Chancery Practice." After speaking of what he at first proposed as to the size of the book, and accounting for the delay in producing it, he says:—

"I did, however, after receiving the late Consolidated Orders, prepare a large amount of matter based on Mr. Smith's book, but when I came to compare his work with the last edition of Daniell (1865), I felt that if I persisted in my first intention, I would be unable to do justice to the subject, for Daniell is so far before Smith, and in fact every other author on Chancery Report, that his work is in England an absolute necessity to every good practitioner; I therefore changed my plan, and I have nearly finished a work which embraces *all of Daniell applicable to this Province, besides all our own orders and decisions*, I have also paid especial attention to the practice in the Master's Office. You are of course aware that this portion of the machinery of the Court in England has been abolished in that country, and Daniell is now therefore no guide for us as to it; but I have taken care to reproduce such portions of the old practice as laid down in the earlier edition of Daniell, Smith, Grant and Bennett, as are now applicable, adding to them all the orders and decisions of our own court.

This has materially increased the size of the work. Daniell contains over 2000 pages of practice volumes, besides two volumes of forms the first containing about 1000—the other about

500. There are thus four volumes—the cost of which here is \$42. I think I shall be able to prepare a complete work in three volumes—two of practice and one of forms; for there is a great deal of matter in the English work quite inapplicable to this Province, though I think the practice cannot be condensed, in justice to the subject, into a smaller space than two volumes of 1000 pages each, with one volume of forms of about 500 pages.

A correspondent of the *Solicitors' Journal*, in writing of the difficulties and doubts attending the act respecting the registration of judgments to bind lands, asks, "Would it not be much more simple to empower the sheriff to sell lands as well as goods under the common law process, without recourse to another tribunal for assistance?" We are not sufficiently conversant with the English system to judge of its advantages or disadvantages, but registration of judgments has been done away with in this country for some years, much to the satisfaction of the public and the profession, and the course of procedure which the correspondent suggests has been the law in this country for more than half a century.

## SELECTIONS.

## THE HIGH SHERIFF.

The office of Sheriff is one of those institutions which, forming an essential part of the machinery of the English constitution, is at once a subject of popular interest and of daily importance to the legal practitioner.

In Serjeant Atkinson's well known work on "Sheriff Law,"—the fifth edition of which has just appeared\*—we find described, in a very lucid style, the practical duties at this day of the High Sheriff and his subordinates, as returning officer in the election of members of Parliament and coroners—as judicial officer in the trial of writs of enquiry of damages, and compensation cases, &c.; as assistant to the presiding judges at the assizes and quarter sessions; as chief executive officer in civil and criminal cases in carrying out the judgment and sentence of the law, and as chief conservator of the peace in suppressing riots or resistance to the law.

This short summary of the learned Serjeant's Sheriff law suffices to show how various and

\* "Sheriff Law, a Treatise on the Office of Sheriff, Undersheriff, Bailiff, &c.," by George Atkinson, Serjeant-at-Law, B. A., Oxon; 5th edition. London: Sweet, 3, Chancery Lane. 1669.

## THE HIGH SHERIFF.

important are the legal functions of the High Sheriff who, in the language of Sir Edward Coke, "is an officer of great antiquity, and of great trust and authority, having from the Queen the custody, keeping, command, and government in some sort, of the whole country committed to his charge and care."

As to the antiquity of the office, learned writers somewhat differ in their speculations, and we may readily acquiesce in the observations of Mr. Serjeant Atkinson on the antiquarian aspect of the subject: "In England there are many good institutions whose beginnings, like the sources of great rivers, seem to baffle discovery. The office of Sheriff is of this kind."

It may suffice for all useful purposes to say that at every period of the English constitution the office of Sheriff appears as an integral part of its system, forming a feature which no power of the Crown, no resistance of the populace, no intrigues of the aristocracy, have ever been able to efface.

The office of High Sheriff really forms one of the most popular features of our constitution, carrying with it, as Blackstone observes, a strong trace of the democratical part of it. The common law, indeed, vested the whole power of election in the people, in order, as an old statute\* expresses it, "that the commons might choose such as would not be a burthen to them." A statute passed under very bad auspices† deprived the people of this power, and the mode adopted ever since of assigning High Sheriffs has been by certain dignitaries holding office under the Crown, who annually nominate three sufficient persons in each county for the office, from whom the Crown selects usually the first on the list for actual service. Fortunately the practice has grown up of these duties wholly devolving on the Judges meeting at Westminster Hall; and thus a guarantee afforded at all events against men being improperly selected for the shrievalty, and the High Sheriff has little cause to fear a comparison between his own just title to office and that of some whom he has occasionally to proclaim on the hustings as "duly elected."

The office of High Sheriff is still a very important one, and so regarded not only in the letter of the law, but socially by all classes. The duties are rarely neglected, but it would perhaps be an advantage if those who are selected for the shrievalty regarded more their personal obligations on taking office.

The High Sheriff, as we are told by Serjeant Atkinson, "has a right of precedence within his county of every nobleman during the time he is in office,"‡ and his duties, already referred to, show on what various occasions he is called upon to act. We are among those who would gladly see the power and dignity of this

ancient office fully vindicated, instead of the more active duties being so much delegated to others, the undersheriffs and their subalterns the Sheriffs' officers and the javelin men; and even the pomp and ceremony of the office being only observable during the *parade* and scramble of the commission day at the assizes; and its concomitants, the Sheriff's ordinary and the Sheriff's ball.

On the very many occasions in the course of his year of office on which public meetings of the various classes within his county are, or ought to be held, we would have the High Sheriff take his legitimate part; we would have the principal exercise more power, and the deputies less. It is not too much to ask of a gentleman selected for a single year for such an important office that he should give personal attention to its numerous duties.

Had High Sheriffs during their year of office generally been at the pains to personally inquire whether one important part of their functions, viz., the returning the jury panels, was conducted in a proper manner, whether abuses in the working of our system, lately shown to have grown up in almost every district, were or were not perceptible in the routine of business in their own several counties, the recent exposure of the abuses of our jury system might have been avoided.

If high Sheriffs, in whose name the unpopular work of executing legal process against the goods and persons of debtors, had during their year of office always deemed it a part of their duty, as gentlemen and men of honour, to see that the process so executed in their names was not made a medium of abuse and extortion, much private misery and wrong would have been saved.

If the Sheriff as returning officer at elections had, in days gone by, in the exercise of his common law power, duly inquired into glaring instances of bribery and corruption, before declaring at the hustings unscrupulous aspirants to the rank of M.P. *duly elected*, we should hardly have needed the costly machinery which from time to time has been called into existence with the vain design of suppressing bribery, intimidation, and other corrupt practices at elections. Not only would we have the High Sheriff now personally oversee the performance of his various duties by his subordinates, but we should be glad to find that high functionary hold his own on all public occasions—be something more than a mere attendant in the execution of the commissions of assize, &c., and act in every instance up to the station the law assigns to him—the chief official within his county, showing favour or subservience to none: poor or rich, noble or commoner, popular or unpopular.—*Law Magazine*.

\* 2s Edward I., c. 8.

† 9 Edward II., st. 2.

‡ Sheriff Law, 3.

## RECENT DECISIONS ON THE EQUITABLE DOCTRINE OF NOTICE.

## RECENT DECISIONS ON THE EQUITABLE DOCTRINE OF NOTICE.

We propose to consider in this article the equitable doctrine of notice, especially as affected by recent decisions. The branch of law illustrated by these decisions may be divided into two parts:—

1. Notice as affixing an equitable liability upon the party affected by such notice.

2. Notice to trustees as perfecting the title of assignees in an equitable chose in action.

Under the first of these heads the recent decisions recorded are those of *Stein v. Stein* (M. R. Ir.) 16 W. R. 69 (distinguished from *Jones v. Smith*, 1 Phil. 255) and *Re Eliza Smallman's Estate* (L. E. Ir.) 16 W. R. 419.

The case of *Jones v. Smith*, referred to by the Irish Master of the Rolls in his judgment in *Stein v. Stein* was as follows:—David Jones, on his marriage in 1820, conveyed a real estate (which was vested in him in fee, subject to a mortgage term of 500 years for securing £2,000 to Samuel Bennett) to the use of himself for life, with remainder to his first and other sons successively in tail. In 1823, Thomas Smith took an assignment of the mortgage term, on the faith of a representation by Jones that the mortgaged estate was not included in the marriage settlement, and afterwards made further advances upon the same security, so that the entire debt amounted to £4,000. On bill filed by the eldest son of the marriage against Smith's representative it was held that Smith was not affected with notice of the settlement, as it appeared that he believed the representation so made to be true; and therefore Smith's representative was held entitled to hold the term as security for the entire £4,000.

In the recent case of *Stein v. Stein*, James Stein died in 1856, intestate possessed (*inter alia*) of a share in the business and premises of a distillery in which his two brothers were co-partners. Disputes arose between the widow of James Stein and the surviving partners, and in July, 1861, an award was made which determined that a sum of £4,900, due by the partnership to the widow as administratrix of her husband, should be discharged by a transfer of their shares in the partnership property to her. These shares were conveyed to her by an indenture of October 14, 1861, which recited the proceedings in the suit and the award. The widow subsequently entered into partnership with her brother, Henry Lefroy, in conducting the same business. In July, 1863, the widow and Lefroy, by a deposit of title deeds created an equitable mortgage of the distillery premises to the Union Bank of Ireland. A memorandum of additional charge was made in February, 1864. The deed of October 14, 1861, was among the deeds deposited with the bank, and it was contended by the next of kin of Mr. Stein that the bank thereby became affected with constructive notice of the widow's representative character as administratrix to her late husband.

The bank contended that they were in the position of purchasers without notice, and relied on certain letters and statements of Lefroy's to them, as amounting to wilful concealment of the widow's representative character, and the assertion that the contrary was the case.

Walsh, Master of the Rolls, held that, giving the utmost weight to Lefroy's statements, the bank was affected with notice, and gave judgment for the next of kin, distinguishing the case from *Jones v. Smith* on two points:—

(1.) In *Jones v. Smith* the information which was held to justify abstaining from further inquiry, accompanied that which was sought to be used as constructive notice, whereas in the case before him the information relied on as constructive notice was contained in a deed handed to the purchaser, and that which was relied on as justifying the mortgagee in abstaining from further inquiry was contained in a long series of letters and communications.

(2.) The suit and award referred to in the deed of 1861, all related to and materially affected the title. Whatever statement Lefroy might have made could not justify the bank in overlooking documents, which they were apprised affected the title.

The Irish Master of the Rolls referred also to *Peto v. Hammond*, 80 Beavan 495, in which case it was contended, that where a condition of sale precluded information, a purchaser had no notice of anything disclosed in the information which was withheld; a doctrine which received no countenance from the Court.\*

In the case of *Eliza Smallman's estate*, 16 W. R. 419, the question was raised how far a person lending money on mortgage of a certain property already subject to an equitable mortgage had been affected by notice of that equitable mortgage in consequence of registry searches previously made by him in the capacity of solicitor to a certain society? The facts were as follows:—

In August, 1860, Smallman deposited with the Bank of Ireland the title deeds to certain premises, by way of equitable mortgage, to secure the repayment of £1,000, accompanied by a letter which was registered. In December, 1860, Smallman negotiated a loan with the Scottish Amicable Life Assurance Society, on the security of other lands. In this transaction a person called Atkinson acted as the solicitor of the Society, and made registry searches against Smallman, which disclosed the existence of the equitable mortgage. In November, 1862, Smallman mortgaged to Atkinson certain lands, including those, the title deeds to which had been deposited with

\* To comment at length on the decision in *Stein v. Stein* would be needless. If correctly reported, it is one of the most extraordinary decisions ever given by a Court of Equity; and violated one of the best established maxims of Equity Jurisprudence—that a person making any payment to an executor or administrator (except under very special circumstances) is never bound to see to the application of the money paid.

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the bank of Ireland, to secure the repayment of £3,400.

Held, that under these circumstances the dealings of Atkinson as solicitor to the Scottish Amicable Life Assurance Society did not, as against the Bank of Ireland, affect him with notice of the equitable mortgage.

But the greater number of recent decisions have reference to the subject of notice to trustees as constituting a title in an assignee or an incumbrance to an equitable chose in action. Since the cases of *Dearle v. Hall and Loveridge v. Cooper* (reported together) 3 Russell 1, it has been an established principle in equity jurisprudence that a second incumbrancer upon equitable property, who has given notice of his title to the trustees of the property, is preferred to a prior incumbrancer who has omitted to give the like notice of his title to the trustees, for the notice is an effectual protection against any subsequent dealing on the part of the trustees. This rule applies to personal property only, and not to real property, *Rooper v. Harrison*, 2 K. and J. 86; nor to trust stock which is in equity of the nature of real estate, *Re Carew's Estate*, 16 W. R. 1077.

But in what manner and to whom ought notice to be given in order to be sufficient for the purpose we are considering? The following cases will assist us in giving an answer to these questions.

In *Ex parte Richardson*, 1 Mont. and Ch. 43, which was decided in 1839, Miss Anne Richardson lent her brother, Mr. Richardson, £1,800, upon the security of two shares in a German mining company, which he deposited with Miss Richardson as a security for the £1,800 advanced, with a memorandum in writing in the following words: "Shares in German mines, the property of Miss Richardson." Mr. Richardson afterwards became bankrupt, and Miss Richardson filed a petition praying that she might be declared equitable mortgagee of the shares. It appeared from the evidence that the bankrupt had in conversation mentioned the fact of the deposit to Mr. Barnard Hebler, one of the directors of the company; and, on a subsequent day, at a meeting of the directors, the fact of the deposit was mentioned by Mr. Hebler. The declaration of insolvency was filed the same evening.

It was held that the conversation with Mr. Hebler was sufficient notice to the company, and the petitioner was accordingly declared equitable mortgagee of the shares in question.

In the *North British Insurance Company v. Hallet*, 7 Jur. N. S. 1263, 9 W. R., 830 (decided in 1861), a Mr. F. H. Thompson in 1834, insured his life with the North British Insurance Company for £2,500, and subsequently on his marriage assigned the policy of insurance to the trustees of his marriage settlement for the benefit of his wife and children. Prior to and at the time of the settlement and marriage, and down to the year 1849, Mr. Mark Boyd (an intimate friend of Mr. F. H.

Thomson) was the resident director of the London Board of the above-named company, and as such resident director it was part of his duty to receive notices in respect of the assignment of policies. More than once before 1849, Mr. F. H. Thomson had informed Mr. Boyd of the assignment of the policy to trustees for the benefit of his wife and family. Mr. Boyd, however, did not communicate the circumstance to any other member of the direction or society, nor did he make any entry in writing of such notice in the books of the company. In June 1853, Mr. Thompson became bankrupt, and in July 1853, the then trustees of his marriage settlement gave formal notice to the company of the assignment of the policy. On Mr. Thomson's death in 1860, the question arose, who was entitled to the payment of the policy monies? The assignees in bankruptcy claimed the payment, on the ground that no effectual notice had been given to the office of the assignment of the policy to the trustees. The trustees on the other hand contended that the notice given to Mr. Boyd by Mr. Thomson was sufficient to give them (the trustees) priority. The question turned upon Mr. Boyd's evidence, which was to the effect that he considered the notice given to him by Mr. Thomson as given to him in his official character as resident director of the company. He could not remember why he did not send notice of it to the head office.

It was argued on the part of the assignees in bankruptcy that the notice given by Mr. Thomson was insufficient on the following grounds:—(1.) It ought to have been given by the trustees, not by the settlor. (2.) It was given to an officer of the Company whose office was temporary. (3.) The notice was not communicated to any other officer of the company, and would therefore cease to be operative when Mr. Boyd retired. (4.) The notice ought to have been entered in the books of the Company. (5.) The uncorroborated evidence of one witness as to what took place so long ago ought to be received with suspicion.

The Master of the Rolls, however, was of opinion that, (1.) assuming the notice to be a good notice, no misconduct or laches on the part of the resident director could affect the rights of the person giving the notice; (2.) that the notice was in fact sufficient, seeing that, though not in writing it was made formally to the person appointed by the company to receive such notices. Had Mr. Boyd been interested in the assignment of the policy; or again, had the notice been made in casual conversation, it appears that the Master of the Rolls would have held it to be ineffectual.

In *Edwards v. Martin*, L. R., 1 Eq., 121, a person named Glenn assured his own life in two insurance companies, the Victoria Life Assurance Company and the Britannia Company; and afterwards deposited the policies with the defendants, who were bankers in Lombard Street, in order to secure a debt due from him. He afterwards became bankrupt



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and died, and the plaintiffs were his assignees. The Secretary of the Victoria Company gave evidence that a verbal notice would not be recognized by the Company; that a notice to be recognized, and to be of any avail or protection, must be in writing; that up to, and for a long time after, the bankruptcy, Glenn appeared by the books of the Company to be the absolute owner of the policy. He recollected however, having heard Glenn mention, in conversation, that the policy was in the hands of his bankers; but the statement was a merely casual one in the course of conversation. The secretary of the Britannia Company gave similar evidence.

Under these circumstance V. C. Stuart held that no sufficient notice of the deposit had been given to the Companies concerned, and that therefore the right of the bankrupt's assignees to the proceeds of the policies had not been displaced.

In *Ex parte the Agra Bank (limited) re Worcester*, L. R. 3 Ch. App. 555, 16 W. R. 879, Mr. J. R. Worcester deposited with the Agra Bank the certificates of various shares, among which were 400 fully paid up shares in a company called the San Pedro del Monte Silver Mining Company, by way of security for the repayment of £1,300 advanced by the bank. At the same time he handed over a blank transfer of the shares. On August 26, 1867, Mr. Worcester became bankrupt. At that time the shares in question still stood in Mr. Worcester's name in the books of the company, the transfer not having been registered therein, nor any notice of the transaction given by the bank to the company. It appeared, however, that in the year 1867, before the bankruptcy, the directors of the company were engaged in making inquiries as to the shares of persons who were defaulters to the company. In the course of those inquiries it came to the knowledge of the directors, through the verbal information of Mr. Worcester, that the 400 shares in question had been pledged to the Agra Bank. Was this information then sufficient to affect the Company with notice? Under these circumstances Mr. Commissioner Winslow held that the shares in question were in the order and disposition of the bankrupt at the time of the bankruptcy, and therefore belonged to the assignees.

But on appeal from this decision the Lords Justices held it to be immaterial in what manner the directors became acquainted with the fact of the transfer, provided they did so become acquainted; and accordingly held that they had effectual notice of the transfer, on the ground that the directors would not, with the knowledge which they had, have been safe in permitting any dealing with the shares.

In *Lloyd v. Banks*, L. R. 3 Ch. App. 488, Mr. T. Lloyd, being entitled to a certain interest in a trust fund of which R. W. Banks was trustee, presented his petition in insolvency on January 19, 1859, and on the 22nd the usual vesting order was made. In Novem-

ber, 1861, he mortgaged his interest to Mark Shephard, and in March following the usual notice of the mortgage was given by Mr. Shephard to Mr. Banks. No formal notice of the proceedings in insolvency was given to Mr. Banks until February, 1864; but he stated that he had read in a newspaper of February 16, 1859, a notice that Mr. Lloyd's petition in insolvency for discharge would come on to be heard on the 4th of March. From that time he had dwelt with Mr. Lloyd on the footing of the insolvency being a fact, and had not paid him his annuity.

Under these circumstances Lord Chancellor Cairns, reversing the decision of the Master of the Rolls (reported L. R. 4 Eq. 225), held that the trustees' knowledge of the insolvency from the advertisement of the newspaper, especially when coupled with the fact that he had practically acted upon the information so gained, constituted notice sufficient to give the assignee in insolvency priority over the subsequent mortgagee.

In giving judgment in this case Lord Cairns observed (p. 490).—

"There is no doubt, with regard to property of the kind in question here, that an equitable incumbrancer, if he has any regard for his own interests—any desire to make his position secure—will take very good care himself to give direct and distinct notice, and that in writing, to the trustees of the property on which he has obtained his incumbrance; and if he does not do that, he will be at very great peril, because he will have to encounter, first, the danger of the trustee being left in entire ignorance of the security, and next, if he attempts to prove knowledge of the trustee *aliunde*, the difficulty which this Court will always feel in attending to what are called casual conversations, or in attending to any kind of intimation which will put the trustee in a less favourable position as regards his mode of action than he would have been in if he had got clear and distinct notice from the incumbrancer. At the same time I am bound to say that I do not think it would be consistent with the principles upon which this Court has always proceeded, or with the authorities which have been referred to, if I were to hold that under no circumstances could a trustee, without express notice from the incumbrancer, be fixed with knowledge of an incumbrance upon the fund of which he is the trustee so as to give the incumbrancer the same benefit which he would have had if he had himself given notice to the trustee. It must depend upon the facts of the case; but I am quite prepared to say that I think the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversations, much less by any proof of what would only be constructive notice—but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust."

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In *Re Brown's Trusts*, L. R. 5 Eq. 88, decided November 15, 1867, William Brocklebank, being entitled to a certain interest in a trust fund, became insolvent in 1838. In the schedule of his assets filed under the insolvency he inserted such interest. No formal notice of the insolvency was given to the trustees of the fund, but the solicitor to the trustees, as being one of the creditors of the insolvent, knew of the insolvency. In 1844, William Brocklebank assigned his interest in the trust fund to Mr. Burkitt, and in 1849 mortgaged it to Mr. Boston, the petitioner in the case. Formal notice of these deeds was given to the trustees of the fund. The question was, whether the indirect notice to the trustees of the fund through their solicitor was sufficient to give priority to the assignee in insolvency.

Held by Sir R. Malins that it was not.

"The true principal," said His Honour, "on which questions of priority depend is, that it is incumbent on all persons dealing with *choses in action* to do all that is in their power to perfect their title, and they do not do so unless they give notice to the persons in whose hands such property is. I think these questions of notice should not be left open to speculation, but that formal notice should be required, otherwise indirect notice might be alleged, raising most embarrassing questions, which should be avoided."

And His Honour quoted with approval the decision of the Master of the Rolls in *Lloyd v. Banks*, L. R. 4 Eq. 222, 15 W. R., 1006 (since reversed on appeal L. R., 3 Ch., App. 488, 16 W. R., 988).

However sound in themselves may be the grounds of the Vice-Chancellor's decision, it is hardly likely that it would be upheld now that the decision in *Lloyd v. Banks* has been reversed on appeal.

On the question, then, as to the *manner* in which notice ought to be given in order to protect an incumbrancer, the principle which appears to be established by the general tendency of recent decisions is that enunciated by Lord Cairns in *Lloyd v. Banks*, that notice will be held to have been given to a trustee, if it be proved that the mind of the trustee has been brought to an intelligent apprehension of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information, and would regulate his conduct by it in the execution of his trust.

With regard to the question "To whom ought notice to be given?" in addition to the cases above cited, we may refer to *Ex parte Boulton in re Skatchley*, 1 De Gex and Jones 163, decided by the Lords Justices in 1857. In that case a holder of shares in a railway company was one of the secretaries of the company. He borrowed money on a deposit of the certificates of the shares, but no further notice of the deposit was given to the company. He afterwards became bankrupt. The Lords Justices reversing the decision of

the Commissioner in Bankruptcy, held, in spite of the official position of the bankrupt in the company, that sufficient notice of the transaction had not been given to the company, the notice which the bankrupt had, not being notice to him in his character of secretary, but in his character of shareholder only.

In giving judgment Lord Justice Turner observed:—

"It is the duty of the person by whom or on whose behalf the notice was given, to take care that it reaches the person who has the control of the property which it affects; and this, I think, cannot be said to be done where, there being other and more effectual means of giving the notice, it has been given only to a person who has an interest in withholding it."

The shares in question were, therefore, held to be in the order and disposition of the bankrupt with the consent of the lender. See also *Brown v. Savage*, 4 Drewry, 635.

It appears, however, from the cases of *Ex parte Richardson*, and the *North British Insurance Company v. Hallett*, that the mere fact that the person to whom the notice is given is a private friend of the assignor or assignee will not invalidate the effect of the notice; nor, after notice has been effectually given, will the laches of the person to whom it is given operate to avoid its effect.

Where a company is ordered to be wound up by the Court, a creditor of the company who assigns his debt completes the equitable title of his assignee by giving notice of the assignment to the official liquidator of the company, although the assignee be ignorant of the assignment, provided the assignment be made in good faith. In *re Breech-loading Armoury Company*, Wragge's case, L. R., 5 Eq., 284.

Notice to any one of several trustees is sufficient (V. C. K. in *Brown v. Savage*, 4 Dr. 640). But, as we have seen, no notice can be of any avail which is given to a person who has an interest in withholding it.—*Law Magazine*.

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A striking instance of what foreigners justly consider an opprobrium in our law, is afforded by the decision of the Exchequer Chamber in the recent case of *Ryder v. Wombwell*. We refer to the mischievous propensity for avoiding the decision of points which the public welfare really require to be settled. To a certain extent no doubt prudence justifies a tribunal in confining itself to the decision of the questions before it in the cause. But where a mere rule of evidence, which has been left in doubt by antecedent conflicting opinions, is fairly raised and elaborately argued on appeal, it is lamentable that it should be left still as a stumbling-block in the path of justice, because the judges find it possible to decide the case without determining the disputed question.

It will be remembered that in that case the judges of the Exchequer were divided in opi-

## 'MISERA SERVITUS'—LYNDHURST AND BROUGHAM.

nion on two points: 1st, whether the issue raised by a replication of 'necessaries' to a plea of infancy, in an action for goods sold, must in all cases be submitted to a jury; and 2nd, whether evidence is admissible to show that the infant was, at the time of his purchase, already furnished with an abundant supply of the articles bought, no proof being offered that the vendor knew him to be so supplied. On the first point, the Exchequer Chamber decided that the question of 'necessaries' was one of fact, to be submitted to a jury like all others, but that the modern rule, unlike the former practice, does not require the judge to submit to the jury a question of fact, merely because there may be a scintilla of evidence, but only where there is such evidence as might reasonably satisfy the jury that the fact sought to be proved is established. Applying this rule, the Court held that there was no evidence in the case to show that a pair of diamond sleeve buttons, costing £25, were 'necessaries' for the infant purchaser, and that the plaintiff should therefore have been nonsuited.

So far the judgment will readily commend itself to the bar as a satisfactory settlement of an open question. But on the second point, which is a mere rule of evidence, which had been fully argued, and had been the subject of divided opinion in the lower Court, the Exchequer Chamber deliberately refused to give an opinion, with the avowed purpose of leaving it open for future dispute at the costs of some unfortunate litigant, and to the annoyance and perplexity of every dealer in England. Nothing but an habitual narrowing of the mind to the technicalities of the profession could possibly shut the eyes of the Bench or the Bar to the really monstrous injustice which is thus created by a too rigid system of adherence to rules established in a bygone age. Reason indicates that the duty of judges is to determine disputed question of law that are properly brought before them by *bona fide* litigants; and if there be a dozen points readily raised and susceptible of final decision, the highest function of the judge is to aid the Commonwealth in determining them, so as to protect it from '*misera servitus ubi lex aut vaga aut incerta est.*'

The language of the decision of the Exchequer is, that the second question raised in the case is one of some nicety, 'to be determined hereafter on the balance of authority and on principle, without being fettered! (*sic*) by a decision of this Court.' What an utter subversion of all sound ideas as to the true functions of a Court, that its decisions on disputed points of law are fetters to bind the limbs, instead of lamps to light the path of those who are seeking for guidance in the pursuit of justice! The contrast on this point between the English and Continental jurisprudence as derived from the Roman law has more than once been the subject of comment; and the learned author of the Principles of Jurisprudence tells us in his eulogy on the precision

and compass of the Roman law, that the student will find 'no awkward attempts at misplaced subtilty, which entail litigation and misery on generation after generation . . . no doubts wantonly flung out, like low-born mists, to spread darkness and confusion everywhere, and perpetuating a feeling of insecurity; *no avoiding points which it is for the public welfare to decide*; but strong sense in transparent language, confounding sophistry, abounding in happy illustrations, and *bearing down obstacle after obstacle* till the path of truth is clear, and the way of justice is made straight.'—*Law Journal*.

## LYNDHURST AND BROUGHAM.

*Lives of Lord Lyndhurst and Lord Brougham*  
By Lord CAMPBELL. London: John Murray.

No one can charge Lord Campbell with Boswellianism. No one can say that he has been kind to the virtues or blind to the faults of his friends. Lord Lyndhurst was a Tory, and therefore Lord Campbell was certain to show him no favour; but we were not prepared for such extravagant vituperation of the late venerable ex-Chancellor. Lord Lyndhurst, like Lord Brougham, was wont to amuse himself by worrying Lord Campbell, and we should not have been surprised if Lord Campbell had indulged in a little retaliation, but we never could have anticipated such a biography as that before us. Lord Campbell was not able to understand the chaff of his noble and learned friends. He believed that they were in earnest. So impossible for him was it to comprehend a joke, and so miraculous was his credulity, that he was under the impression that Brougham was jealous of him! It is plain that Lord Campbell deemed himself a better lawyer than Lyndhurst, a cleverer man than Brougham, and a better citizen and a better man than either of them. Lyndhurst and Brougham never did right, while Campbell never did wrong. Campbell became Lord Chief Justice of England and Lord Chancellor by reason of his unequalled abilities and merits, and in spite of the jealousy of Lyndhurst and Brougham, whilst Lyndhurst and Brougham attained to high office by intrigue and by sheer luck. As an instance of Lord Campbell's marvellous faith in his own infallibility, we may take this instance. At page 27 we read:—

Smith O'Brien was convicted of high treason in Ireland when I was a member of the Cabinet, guiding the deliberations of the Government in such matters. He was clearly guilty in point of law and fact too; but this rebellion was so ludicrously absurd that I thought it would take away all dignity and solemnity from the punishment of death if it should be inflicted upon him, and my advice was followed in offering him a pardon on condition of transportation. So foolish was he that he denied the power of the Crown to commute the sentence without his consent; and he insisted on being immediately liberated, or hang-

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ed, beheaded, and quartered. I was actually obliged to bring in and push a bill through Parliament (against which he petitioned) to sanction the conditional pardon.

If Smith O'Brien was not right, and Lord Campbell not wrong, what need was there of pushing a bill through Parliament? But our author could not conceive it possible for John Campbell to make a mistake.

The memoir of Lord Lyndhurst was begun in 1853. Lord Campbell thus writes:—'Having known him familiarly above half a century, both in public and in private life, I ought to be able to do him justice; and notwithstanding a hankering kindness for him, with all his faults I think I can command sufficient impartiality to save me in this memoir from confounding the distinctions of right and wrong.' He commences by insinuating that Lyndhurst was ashamed of his ancestry, and was annoyed at being called the son of a painter, though by the way he occupied the house his father had lived in. Much parade is made of the fact of young Copley being born in America. The biographer then anticipates a little in order to have a fling at the subject of his memoir, at his friend of fifty years' standing, whom he was meeting day after day. Before coming to Lyndhurst's call to the Bar, we are told that till 'he was tempted to join the Tory ranks by the offer of a seat in Parliament and the near prospect of the office of Chief Justice of Chester, he thought a democratic revolution would be salutary, and he is said to have contemplated without dismay the possible establishment of an Anglican Republic.' This same charge of political corruption is repeated more than once in the biography, and there is no good reason for putting it in Chapter I. Next page there is this remark: 'In after life he asserted that he had never been a Whig, which I can testify to be true. He was a Whig, and something more, or in one word a Jacobin.' The italics are the author's not ours, and throughout the volume italics are frequently used lest the careless reader should pass by any of the author's charitable suppositions. At page 13 it is stated that Copley, 'although by no means scrupulous about principle, was above any sort of meanness.' After a lengthy account of how Copley ratted and became a Tory for the sake of a seat in Parliament and the promise of promotion, we are informed that 'Upon the first vacancy he was made Solicitor-General, and he regularly became a member of Lord Liverpool's Government. He talked rather uncourteously of his chief and of his colleagues, but he very steadily co-operated with them in all their measures, good or bad.' In order that we may understand what a shameless, hardened, heartless renegade Lord Lyndhurst was, we are treated to the following pretty little story:—

His (Copley's) gait was always erect, his eye sparkling, and his smile proclaiming his readiness for a jest. How different his late from that of

poor Charles Warren, who had been a Whig and nothing more. In an evil hour he ratted, being made Chief Justice of Chester; but he could not stand the reproachful looks and ironical cheers of his former friends in the House of Commons, and he soon died of a broken heart.

Copley was a very great villain, but he cared not for reproachful looks and ironical cheers. Poor Warren was a villain of a milder type, yet he died of a broken heart. Copley was a familiar friend for above half a century, and Campbell had a hankering kindness for him. Are there many Campbells in the world? If so, let us add this petition to the Litany: 'From the hankering kindness of friends, good Lord deliver us!'

Sir John Copley marries, and this gives the biographer an opportunity for a fling at the private character of the friend of fifty years, for whom he had a hankering kindness.

'There were afterwards jealousies and bickerings between them (Sir John and Lady Copley), which caused much talk and amusement; but they continued together on decent terms till her death in Paris in 1834, an event which he sincerely lamented. He was sitting as Chief Baron in the Court of Exchequer when he received the fatal news. He swallowed a large quantity of laudanum and set off to see her remains. *But his strength of mind soon fitted him for the duties and pleasures of life.*' On this occasion the italics are ours and not the author's, who doubtless omitted to mark the passage, and would have done so if he had revised the sheets. We trust that the full force of the spiteful inuendo will not escape the attention of the reader. Do you think that the political renegade had one redeeming trait? Do you think that, his wife being dead, he was truly sorry for her untimely end? Ah! be not deceived. Lord Campbell was a friend, a familiar friend, a familiar friend for half a century, and he has a hankering kindness for Lyndhurst, therefore he is disposed to be reticent, yet he will be just, so he tells us that the bereaved husband was soon fitted not only for the duties, but also for the pleasures of life. Lord Campbell's well known Act *apropos* of certain publications does not make improper insinuations criminal.

Here is an account of Copley's conduct as a judge: 'The gossip of the profession during the short time he was Master of the Rolls was that "he sat as seldom as possible, rose as early as possible, and did as little as possible." His whole energies were now absorbed in political intrigue.' As Lord Chancellor, 'he showed capacity for becoming one of the greatest magistrates who ever filled the marble chair; but, alas! at the same time utter indifference about his future judicial fame—doing as little business as he could without raising a loud clamour against him, shirking difficult questions that came before him in his original jurisdiction, and affirming in almost every appeal—satisfied with himself if he could steer clear of serious blunders, and escape from

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public animadversion.' As Lord Chief Baron, 'he would not heartily give his mind to his judicial business. His opinion was and is of small weight in Westminster Hall; and I do not recollect any case being decided on any judgment or dictum of his. It was only while in court that he cared or thought of the causes he had to dispose of. The rest of his time he spent in attending the debates in the House of Lords, or in forming cabals with his political partisans, or at the festal board.' After this, and much more of the same sort, it is a comfort to be told that Lyndhurst 'did not take bribes.' The statement is comforting, but not assuring. Possibly the familiar friend of fifty years' standing suffers his stern sense of justice to be tempered by his hankering kindness. Why are we told that Lord Lyndhurst did not take bribes? Was he charged with such corruption? Never. Is not the reader somewhat enlightened? Does he not see how Campbell blends justice with hankering kindness? Do not nail his ear to the post. He did not take bribes. Umph! We understand. We could easily fill columns with such quotations as we have already given, but enough is as good as a feast, and therefore we shall only take one more passage from the 'Life of Lord Lyndhurst':—

Lyndhurst was about this time much alarmed by a bill I had introduced to abolish imprisonment for debt, and to provide a more efficient remedy for creditors by the personal examination of the debtor as to his property and his past expenditure. The stories about executions in Lyndhurst's house I believe were unfounded; but he was still needy from inconsiderate expenditure, and it was by no means clear that a judgment for a debt might not have been suddenly obtained against him. He came privately to me and pointed out the oppression and extortion that might be practised by the power proposed to be given to judgment creditors, and insisted that as the members of the two Houses were not subject to imprisonment for debt, they ought not to be subject to the inquisition substituted for it.

Here is a portrait black as midnight. The son of a distinguished artist is ashamed of his father because he was not aristocratic. An ultra-Republican becomes an ultra-Tory for the sake of place and pay. The judge of the highest Courts in the realm neglects his duties and devotes his energies to political intrigues, so that the best his familiar loving friend can say is that 'he did not take bribes.' This unprincipled politician and unrighteous judge was also a bad man in his private relations. He lived on bad terms with his first wife, and soon forgot her early death and returned to the pleasures of life. He was a spendthrift, and wanted to have a proposed law framed so that he might still be able to defy his unfortunate creditors. Let us complete the portrait by showing that this monster of iniquity could descend to the pettiest meannesses. In page 168 we read as follows:—

Brougham generally spoke rather respectfully

of Lyndhurst behind his back, while Lyndhurst behind Brougham's back was always ready to join in exaggerating his faults and laughing at his eccentricities. During the rest of the day, till it was time to take an airing in his carriage, Lyndhurst was ready to receive all visitors who might drop in. On these occasions it was expedient to go late and stay the last; for I observed the practice to be, that each visitor on departing furnished a subject of satirical remark for the master of the house and those who remained.

Such is the picture, as drawn by Lord Campbell, of Lord Lyndhurst, who, the son of an artist, became Master of the Rolls, the Lord Chief Baron of the Exchequer, four times Lord High Chancellor, and one of the most respected and venerated members of the House of Lords. This biography is of course a gross libel in fact, and, must we add, in intent? No doubt Campbell disliked Lyndhurst for several reasons. Lord Lyndhurst was a Tory, and Campbell hated Tories. Campbell was a dull, heavy plodder, whilst Lyndhurst was a vivacious and brilliant member of society. Campbell never jested, whilst Lyndhurst was fond of jesting, and no doubt told his acidulated friend any number of ridiculous stories, and possibly represented himself as Campbell has represented him in the book. This is the most probable explanation of this biography, and though it does not excuse Lord Campbell's persistent bitterness and ill-nature, it exonerates him from the grave offence of deliberate and conscious slander.

If Lord Brougham had died in 1834, his reputation would have been so great that he would probably have been classed amongst the marvels of the nineteenth century. But thirty years of conspicuous success were followed by thirty years of conspicuous failure, and Lord Brougham lived to prove that his powers had been overrated by himself and by his contemporaries. At the passing of the Reform Bill, Brougham was at the zenith of his fame. He was the hero of the revolution and the popular idol. Plaster casts of his head were sold by tens of thousands, and a gaping world wondered how one skull could contain so much and such varied knowledge. In science, literature, law, politics, and oratory Henry Brougham was supposed to be without a compeer. He was a modern Cicero and something more. In him were supposed to be united the talents of Newton, Bacon, Gibbon, Camden, Pitt, and Demosthenes. Stories were told of his working twenty hours out of the twenty-four. He rose before the lark, dashed off an article for the *Edinburgh*, and wrote a hundred letters before breakfast. He was in Court from nine till four, amazing judges with his legal lore, or enchanting juries with his eloquence. From the Court of Justice he rushed to the House of Commons, to instruct, dazzle, and delight the listening senate. Then home: but before going to bed, the unwearied phenomenon would indite an essay on science that would throw the discoveries of

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Newton and Laplace into the shade. This story was believed, and it needed long years of failure to convince the credulous vulgar that the powers of Henry Brougham were not superhuman. In truth, Henry Brougham was not in any sense a man of genius. His parts were excellent, his ambition was great, his capacity for work was immense, and he excelled in many departments. But he did not excel pre-eminently in anyone department. He was undoubtedly a good orator, or perhaps it would be better to say a ready and effective speaker. His most celebrated speeches are those he delivered in defence of Queen Caroline, and on the second reading of the Reform Bill. Lord Campbell sneers at both, though to have saved himself from perdition, he could not have composed or indited such discourses. Yet, though these orations are far above mediocrity, they are not to be compared to the great speeches of Burke, Chatham, and Charles James Fox. Let any one glance at the well-known peroration to the Queen Caroline speech, and let him then take up a volume of Mr. Bright's speeches, and glance at some of the perorations of the Right Hon. Member for Birmingham, and he will at once perceive that Brougham was a clever speaker, but not like Mr. Bright, an orator born as well as made; for, in spite of the maxim, a man cannot be an orator unless gifted by nature, even as a man cannot be a poet who does not add to cultivation the inborn talent for poesy. It would be superfluous to canvass the claim of Brougham to be accounted eminent as a lawyer. It is now universally admitted that he was deficient as a lawyer, and that he was not even successful as a *nisi prius* advocate. His defence of Queen Caroline gave him a splendid chance. For a few terms he was inundated with briefs, but his practice soon fell off. He was not competent to argue a point of law, being prone to put forward theories in place of precedents, and he was not fortunate in winning verdicts. As Lord Chancellor he justly boasted that he cleared off the arrears of the Court, but his judgments were not profound, they do not elucidate the principles of equity, and they are seldom referred to. Lord Brougham was a zealous law reformer, but his zeal was not tempered with discretion, and was not guided by knowledge. Considering that he was for nearly half a century talking about law reform, it is surprising how little he accomplished. Lord Campbell says, 'If it would not appear malicious, I would like to move for a return of all the bills introduced into the House of Lords by the Lord Brougham and Vaux since the month of November 1830, with the number of those that have passed into Acts of Parliament, the stages in which the others have died, and the estimated expense of printing them.' Such a return would vindicate our remarks on Lord Brougham as a law reformer, but it is a rich joke to suppose that Lord Campbell was restrained from moving for it lest he should appear malicious. In sci-

ence Brougham has done nothing more than write some clever papers, and his labours have not contributed to the advancement of science. As a *littérateur* Brougham had a very moderate success. Of his 'Speeches with Historical Introductions,' Lord Campbell tells us that he heard from Mr. Black, the publisher, 'that a large proportion of the edition was damasked—i. e., passed through a machine by which small squares are impressed upon the printed pages before they are sent to line trunks.' As to his 'Political Philosophy,' Lord Campbell says: 'I do seriously and sincerely think it a most excellent treatise, and I have *bona fide* read it through with pleasure and advantage; but I could never find more than one other person who had undergone the same labour, and the fact was that, unaccountably, it fell still-born from the press. Anticipating a great sale from the reputation of the author, an edition of several thousands had been printed off, and they almost all went to the trunk-maker. The Society of Useful Knowledge (to which Lord Brougham had very generously presented the copyright), had been before in pecuniary distress, and this blow proved its death.' Please to remember that Lord Campbell was a loving friend, that he was under considerable obligations to Brougham, that he had a horror of even the appearance of malice, and then the foregoing passage will be read with amusement or disgust, according to the temperament of the reader. The most successful of Brougham's works was his 'Sketches of Statesmen.' His contributions to the *Edinburgh*, very well in themselves, are not comparable to the essays by Jeffrey, Sidney Smith, or Macaulay. As a politician, Brougham was guilty of grave errors of judgment. After his election for the county of York, he said, 'Nothing on earth shall ever tempt me to accept place.' This was a very imprudent and a very improper declaration. A man who enters the House of Commons ought to be ready to serve his country in office, if he is called upon to do so on fair and honourable terms, and to refuse office on any terms is to shirk bounden duty and honourable responsibility. Soon after, in the House of Commons, he said during the ministerial crisis, 'No change that may take place in the administration can by any possibility affect me.' This was on the 16th November, 1830, and yet on the 22nd of the same month, six days after, he received the Great Seal from the King, and went to the House of Lords as Lord Brougham and Vaux. Such conduct was calculated to render him unpopular and to make him an object of suspicion. We need not, however, assume that Brougham was insincere. It is probable, not to say certain, that a week before he was named Lord Chancellor he had no idea of taking office, and unquestionably the elevation involved a heavy sacrifice, since he had to relinquish a proud position in the Commons. He recovered his popularity by his vehement support of the Reform Bill, but it seems that he needless-

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ly offended and irritated the King. In 1834, his conduct was extraordinary. He was manifestly intoxicated with success. He made a sort of 'progress' through Scotland, and spoke of the King as though he had been commissioned to represent the sovereign in the northern kingdom. After receiving the freedom of the city of Inverness he said: 'To find that he (the King) lives in the hearts of his loyal subjects inhabiting this ancient and important capital of the Highlands, as it has afforded me pure and unmixed satisfaction, will, I am confident, be so received by His Majesty when I tell him (as I will do by this night's post) of such a gratifying manifestation.' No wonder that the King was deeply offended, and that colleagues and friends began to doubt the sanity of the Lord Chancellor. In November the Ministry was dismissed, and Brougham, instead of delivering the Great Seal into the hands of the King, sent it to His Majesty in a bag. At this time Brougham was fifty-six years old, and he expected soon to return to office; but though he lived for thirty-four years, his fond hopes were not gratified. Lord Melbourne tricked him by putting the Great Seal into commission, and then appointing Lord Cottenham to the Chancellorship. Lord Brougham was badly used by his political friends. Lord Melbourne said, 'Although he (Brougham) will be dangerous as an enemy, he would be certain destruction as a friend. We may have small chance of going on without him, but to go on with him is impossible.' Yet we hold that the attempt should have been made, and it is not impossible that during a second tenure of office Lord Brougham would have been less self-opinionated, and would have been more careful not to transgress official etiquette.

What then shall we say of Lord Brougham? Shall we recite the threadbare adage that, 'A Jack-of-all-trades is master of none'? Doubtless if Brougham had applied himself exclusively to the study of the law, he would have been a profoundly read lawyer, but it by no means follows that he would have won for himself the cognomen of the English Justinian. If he had kept to science, he might have produced some valuable treatises, but it is not to be inferred that he would have gained distinction as a discoverer. It seems to us that Brougham was not endowed with that quality of mind which we may describe as penetrating. His mental vision was powerful to survey vast realms of thought, knowledge, and speculation, but he had not the faculty of deep research. He was superficial, but not in the ordinary sense of that term. He did more than skim the surface. He could and did follow the lead of other minds, but he could not open up new and unexplored regions. Lord Campbell tells a story of Brougham getting £1,000 from Jeffrey, to be repaid in articles for the *Edinburgh*, and that in a few weeks he had written enough copy for an entire number of the *Review*. Whether the story is true or false, it

illustrates the speciality of Brougham's powers. He could write, and write well, on any subject. He was a critic, but not a creator. If then he has left few works to bear witness to his industry and ability, we must not forget that he took an active part in many important movements. He did less than might have been expected as a law reformer, yet, as Lord Campbell remarks, 'without his exertions the optimism of our legal procedure might long have continued to be preached up, and *Fines* and *Recoveries* might still have been regarded with veneration.' He did much, very much, towards the spread of education. He was indeed the hardest worker of his age; and it is far easier to set forth what he did not do, than to sum up his accomplishments.

Lord Campbell does not vituperate Brougham as he does Lyndhurst. Brougham was a Whig, and therefore Campbell did not hate him politically. Then, in later life Campbell received many kindnesses from Brougham. The ex-Chancellor used his utmost efforts to get Campbell appointed Lord Chief Justice, and he succeeded. Campbell was received cordially at Brougham Hall and at Cannes. Yet Lord Campbell never misses an opportunity of being spiteful. It is with evident relish he tells us that Brougham's 'Speeches' would not sell, and went to the trunk-maker's, and that the 'Political Philosophy' fell still-born from the press, and ruined the Useful Knowledge Society. We are told of 'Brougham's strange practice of recklessly making statements in the presence of those who he knew might, if so inclined, have flatly contradicted him.' Lord Campbell cannot be charged with that species of recklessness, since he took care that his statements were not published until the attacked persons were dead. At page 539 we read: 'It is my duty, as a true and impartial biographer, to relate that he was made very unhappy by the successful publication of my *Lives of the Chancellors*. . . He wrote himself, or induced others to write in periodicals over which he had influence, stinging articles against the book and its author.' At page 549 we read: 'Cottenham grew worse, and a paragraph appeared in the newspapers stating that I was likely to be the new Chancellor. This brought out a series of scurrilous articles in the *Morning Herald* (Brougham's organ) vilifying me.' Probably the reader has had enough of Campbell's spite, and therefore we will quote no more of it, but will conclude our somewhat lengthened notice by extracting two capital jokes. Lord Campbell refers to a visit to Brougham Hall, accompanied by his wife and daughter, and says they were most kindly and hospitably received, and adds:—

'Indeed, I still feel not only regret, but something savouring of remorse, when I am obliged, as a faithful biographer, to record anything which may seem not altogether to the credit of one with whom I have spent so many pleasant hours.'

This is perhaps the richest jest in the book, though the following one is well worth repeating. Lord Campbell called on Brougham in Grafton Street, and on meeting him the latter said: 'Lord bless me, is it you? they told me it was Stanley!' In the evening, in the House of Lords, Lord Campbell went up to Brougham and Lord Stanley, who were engaged in conversation, and mentioned the circumstance. Lord Brougham remarked:—

'Don't mind what Jack Campbell says. He has a prescriptive privilege to tell lies of all Chancellors dead and living.'

From which we infer that Lord Campbell need not have felt the slightest remorse about his spiteful innuendoes and assertions; and that, if this biography had been published during the lifetime of Lord Brougham, he would only have laughed at it, and reminded us of Jack Campbell's prescriptive privilege in respect to Chancellors dead and living.—*Law Journal*.

## ONTARIO REPORTS.

### COMMON LAW CHAMBERS.

#### NOTES OF RECENT CASES.

#### BANK OF BRITISH NORTH AMERICA V. WHITE.

*Taxation—Revision—Explanatory affidavit.*

Taxation on entering judgment in the deputy's office, London. Ordinary affidavit of disbursements produced and filed with deputy master. Objection taken, that some of the witnesses were not examined at the trial. An admission to that effect was made by plaintiff. The deputy held that it was unnecessary to show that the witnesses were examined, or to file any affidavit setting forth matter giving good reason for their not being called and examined; and that no affidavit other than the ordinary affidavit of disbursements was necessary.

The costs were revised before the master at Toronto, who held that the deputy was wrong, and that as an admission was made that some of the witnesses were not called and examined, the costs of such witnesses could not be taxed without an affidavit showing good and sufficient reason why they were not called and examined; but the master allowed plaintiff to file such an affidavit on the revision, as an exception to the rule that the revision, on notice before the master at Toronto, must be on the same material only as before the deputy, were the master considering that such affidavit was not filed, owing to the mistaken ruling of the officer of the court, and that therefore the plaintiff should not be prejudiced thereby. This decision was appealed from.

*J. K. Kerr* for appellant.

*S. Richards, Q. C.,* contra.

RICHARDS, C. J., held that the master was right in receiving plaintiff's explanatory affidavits as to the witnesses not called or examined.

#### MOORE V. PRICE ET AL.

*Costs—S1 Vic. cap. 24, sec. 2, sub-sec. 2, 4.*

[January 16, 1869.]

In this action a verdict having been found for the plaintiff for \$118, Mr. Justice Gwynne, before whom the case was tried, certified on the record as follows: "I certify to entitle the plaintiff to County Court costs."

The plaintiff taxed County Court costs in the presence of the defendants attorney at \$66 76, which taxation was admitted by the attorneys for both parties to be correct.

The defendants attorney then produced and required the taxing officer to tax a Superior and County Court bill, claiming that he had a right to set off the difference between the two bills produced by him against the plaintiff's costs.

The taxing officer refused to allow any set off for costs to the defendants.

It was agreed that if the defendants were entitled to set off costs against the plaintiff that the amount that ought to be set off was \$26 83.

The question then arose, whether, under the statutes of Ontario, 1867-68, cap. 24, sec. 2, subsecs. 2, 4, particularly, and the effect of the statute generally, the defendants had a right to set off costs of defence against the plaintiffs costs and verdict?

*Crombie* for plaintiff.

JOHN WILSON, J.—Ordered the Master to tax to the plaintiff County Court costs, and not tax to defendant any costs of suit.

#### BOYD ET AL. V. HAYNES (BRITISH AMERICA ASSURANCE CO. GARNISHEE.)

*Attachment of debts—Verdict—Affidavit.*

[February 1, 1869.]

Duggan, Q. C., for execution creditors, moved for an order on the garnishee to pay over to the creditors the amount of a verdict recovered on a policy of assurance against fire.

Spencer, for judgment debtor, showed cause.

HAGARTY, C. J.—A verdict for unliquidated damages cannot be attached, and it makes no difference that the garnishees attorney told the attorney for the judgment debtor, that they had agreed on the costs, and promised to pay without seeking judgment. If not a debt until judgment this conversation cannot make it such.

An application of this kind must be supported by an affidavit of the plaintiff or his attorney.

#### REG. EX REL. FLUETT V. SEMANDIE.

*Municipal election—Qualification—Assessment roll.*

[February 20, 1869.]

This was an application to unseat one of the councillors elect for the town of Sandwich, on the ground that he was not possessed of sufficient property qualification.

Harrison, Q. C., for relator.

Warmoll contra.

JOHN WILSON, J.—A person desiring to qualify as town councillor cannot supplement his qualification on his real estate, which was assess-



## Com. Law Cham.]

## NOTES OF RECENT CASES.

## [Com. Law Cham.]

ed on the roll at \$750 (\$50 less than the required amount) by adding thereto \$400 of personal property.

The assessment roll is conclusive as to the rating, and there can be no enquiry behind this as to whether the candidate has more real property than that for which he was rated on the roll.

## REG. EX REL. ARNOLD V. WILKINSON.

*Municipal election—Town of Sandwich—Interpretation of Statutes.*

[February 25, 1869.]

The town of Sandwich was incorporated by 20 Vic. c. 94, which also provided for the election of mayor and councillors, &c. This enactment was not expressly repealed by the late Municipal Act, with which, however, it clashes.

This application was to unseat the mayor elect on the ground that he was not properly elected, in that he was elected by the people, and not from among the councillors.

*Harrison, Q. C., for relator.*

*Warmoll contra.*

JOHN WILSON, J.—A special Act of Parliament cannot be repealed by a general enactment, except when there is express reference to it. The Statute 20 Vic. cap. 94, is not therefore repealed by 29, 80 Vic. cap. 51, sec. 428.

The late act amending the Municipal Act of 1866 (31 Vic. cap. 80, sec. 6, Ontario), must be read in connection with the act incorporating the Town of Sandwich (20 Vic. cap. 94, secs. 2, 3), and so reading them, the Town of Sandwich having only one ward is entitled only to three councillors, in addition to a mayor and a Reeve, elected by the people.

No costs were given, as the point was doubtful, owing to the loose way in which the repealing clause in the Municipal Act was drawn.

## REG. EX REL. FLUETT V. GAUTHIER.

*Municipal election—Disqualification—Interest in contract with corporation.*

[February 26, 1869.]

This was a similar application to the last, the ground alleged being that the defendant was interested in a contract with the Corporation of Sandwich, to which he had been elected a councillor.

*Harrison, Q. C., for relator.*

*Warmoll contra.*

JOHN WILSON, J.—I do not think that it is necessary that a valid contract should be shewn binding on the corporation. If there is no contract binding on the corporation the danger is the greater of the party improperly using his position to his own advantage and to the prejudice of the Municipality. The policy of the law is, that no man should be a member of a municipality who cannot give a disinterested vote on a matter of dispute that may arise. If his judgment is likely to be clouded by self-interest in a matter of contract or quasi contract he should not be a member of the council.

An order was made to unseat the defendant, but it was unnecessary, owing to the decision in the last case, to order a new election. No costs.

## PURCELL V. WALSH.

*Assault—Several pleas.*

[February 26, 1869.]

JOHN WILSON, J.—The practice has been for years to allow pleas of not guilty and justification to be pleaded together to an action for assault. *Goldburgh v. Leeson*, 2 U. C. L. J. 209, overruled.

## QUEBEC BANK V. GRAY.

*Law Reform Act, 1868—Notice for jury—Similiter.*

[March 4, 1869.]

Action on promissory note. Special plea on equitable grounds. Issue taken thereon by plaintiff.

Rejoinder by defendant, who "joined issue," and gave notice for a jury under sec. 10 of Law Reform Act, 1868.

A summons was obtained to set aside rejoinder and notice for jury.

*Harrison, Q. C., shewed cause.*

*Leith contra.*

HAGARTY, C. J.—The old *similiter* is not done away with by the Common Law Procedure Act, but is in fact preserved by section 108 of that Act. The only effect of that statute in this particular case is to give a short form of a pleading in denial. Summons discharged.

## COOPER V. WATSON.

*Declaration not founded on writ of summons—Setting aside,*  
[March 4, 1869.]

*Boswell* obtained a summons to set aside a declaration on the ground that no writ of summons had been served on defendant whereon to ground it.

*Harrison, Q. C.—1.* The affidavit is defective in not shewing that the writ had not come to defendant's knowledge.

2. A declaration without a writ of summons is only an irregularity which can be waived, and has in this case been waived by defendant's laches.

HAGARTY, C. J.—Held both objections good. Summons discharged.

## ALLAN V. ANDREWS.

*Commission to examine witnesses—Application before issue joined.*

[March 6, 8, 1869.]

*Scott*, for plaintiff, asked for an order for a commission to take the evidence of a person in the United States. The application was made before issue joined, to expedite proceedings.

*Oster* shewed cause. There is no sufficient reason why the general rule that a commission will not be ordered until issue joined; and it makes no difference that the plaintiff undertakes not to execute it before issue joined.

GWYNNE, J., refused the order.

Insolv. Case.]

RE HUFFMAN—IN RE SULLIVAN—IN RE HUNTER.

[Prob. Case.]

## INSOLVENCY CASES.

(Before Hon. Geo. SHERWOOD, Judge of the County of Hastings.)

## IN RE HUFFMAN, AN INSOLVENT.

*Insolvency—Notice.*

Notice of application for discharge in *Canada Gazette*, and not in *Local Gazette*. Held sufficient.

It is sufficient to publish notices of application for discharge in the *Canada Gazette*.

The insolvent filed his petition on the 2nd Feb. 1868, for discharge.

*Jellitt*, appeared for a creditor, and objected, that notice of application should have been published in the *Ontario Gazette*.

Other matters came up in this application to which it is not necessary to refer.

SHERWOOD, Co. J.—By the 91st clause of the Insolvent Act, 80 & 81 Vic. c. 3, I find among other things that the Parliament of Canada has exclusive legislative powers in matters of bankruptcy.

The Insolvent Act of the late Province of Canada, requires that all notices under that statute shall be published in the *Canada Gazette*, and this paper was, prior to the passing of the Act of Confederation above mentioned, the evidence of all official notices in matters relating to the administration of justice in the former Province of Canada.

The 3rd sec. of the Act of the Ontario Legislature, 31st Vic. cap. 6, enables the Lieutenant Governor to authorize the publication of an official gazette, to be called the *Ontario Gazette*, for the publication of official and other matters, and all such matter whatever as may be from time to time desired; and that all advertisements, notices and publications, which by any act or law in force in this Province, are required to be given by the Provincial Government or any department thereof or by any sheriff or officer, person or party whatsoever, shall be given in the *Ontario Gazette*, unless some other mode of giving the same be directed by law. And if in any act in force in Ontario, of the late Province of Upper Canada, or of the late Province of Canada, any such notice is directed to be given in the *Upper Canada Gazette* by authority or in the *Canada Gazette*, the *Ontario Gazette* shall be understood to be intended; and it repeals c. 13 of the Con. Stat. of Canada, which heretofore related to that part of the late Province of Canada, now Ontario.

If the Act of Ontario above mentioned, is to be construed literally, it interferes directly with the statute of Canada respecting insolvency which is now in force in Ontario, and deals with a subject which the Imperial Legislature has placed exclusively under the Parliament of Canada. I must confess I feel great reluctance in coming to the conclusion I have. It appears however to me, on full consideration of the subject, that the Act of Ontario was only intended to apply to notices that were connected with matters over which it had control, either exclusively or jointly, with the Legislature of Canada, and not to those within the authority of the last mentioned Legislature. The Act of the late Province of Canada should govern, I think, as to notices in bankruptcy, and the publication of notices in the *Canada Gazette* is therefore sufficient.

Discharge ordered, but on other grounds suspended for six months.

## IN RE JOHN SULLIVAN AN INSOLVENT.

*Assignment, to what official assignment—Assignment must be in duplicate—Neglect to keep books of account.*

This was an application for the discharge of the insolvent. It was opposed on the ground that the insolvent, according to his own statement, never was in business for himself, but had for several years both worked as foreman for his father and brothers in getting out and bringing lumber down the Trent. They resided in Seymour, and their business was there transacted, except as to receiving advances and selling their lumber, which was principally done at Trenton. The insolvent set out in his petition that at a meeting of his creditors called pursuant to the statute, his sole creditor attended the meeting, and appointed William Henry Delaney of the Township of Murray, in the County of Northumberland, his assignee, who refused to act, and that on such refusal, he appointed George Dean Dickson, an official assignee for the County Hastings. The assignment appeared only to have been executed in one part to the official assignee, and no copy was filed with the clerk of the court.

*Lazier* opposed the discharge of insolvent on the part of his creditor.

SHERWOOD, Co. J.—The 4th sub-sec. of the 2nd sec. of the Insolvent Act, provides (among other things), if the assignee appointed at the meeting refuses to act, the insolvent may make an assignment to any official assignee of the county in which the insolvent has his place of business. The insolvent has no place of business, and was foreman to persons whose place of business seems to me, by his own statement, to be within the County of Northumberland; and we may fairly infer that the insolvent's place of business was the same, if he had any business at all. His residence was within that county, and I think that the assignment should have been made to the official assignee of that county.

The 6th sub-sec. of the same section enacts that the deed or instrument of assignment if executed in Upper Canada shall be in duplicate, and although it may be (as argued by the insolvent's counsel) that the assignment in one part passed all the insolvent's property to the assignee, it does not comply with the statute which is mandatory.

The insolvent has not, subsequent to the passing of the Act, kept any account book, shewing his receipts and disbursements in cash, nor was he able to give any account of them on his examination.

For these reasons I must refuse to grant his discharge.

## PROBATE.

## IN RE HUNTER.

(In the Surrogate Court of the County of Norfolk.)

*Appointment of Guardian—Practice—Notice—When application may be made—Reasons for application—Second Marriage of Mother—Caveat—&c.*

This was an application made by the infant children of one John Hunter deceased, for the appointment of David Hunter as their Guardian.

In this notice, served upon the mother, and also in the published notice, it was stated that appli-

## Prob. Case.]

## IN RE HUNTER.

## [Prob. Case.]

cation would be made before the Judge in his Chambers on Wednesday the 3rd of February, 1869, at 11 o'clock a.m. In consequence of the absence of the Judge on that day, no proceedings were then had. On the following day however both parties appeared by their counsel, when an appointment was made for the 16th February. Mr. Foley on behalf of Mrs. Sheldrick, the mother of the minors, raised the following objections.

1. That the application is informal and incorrect, in this, that there is no affidavit of the witness to the signatures of the infants, and further, that the witness should have been personally present for examination.

2. That the proceedings of to-day are illegal, not being in accordance with the written and printed notices.

3. That the notice served upon the mother is inconsistent with the notice published, in this, that it contains an addition viz., "or so soon thereafter as counsel can be heard" and that both notices should conform.

4. That no such notice as the statute requires of any proceeding to be had this day, has been given.

5. That the 20 days' notice required by the statute has not been given.

6. That the security required by statute has not yet been given.

7. That no reason has been assigned why the children should be removed from the care of their natural guardian.

8. That the affidavits are not entitled in any cause.

9. That the papers and affidavits filed, show that the mother had been legally appointed administratrix &c., and therefore had the legal right to the administration of the estate.

10. That the real estate is subject to Mrs. Sheldrick's dower.

For these reasons she objects and protests against the appointment of Mr. David Hunter as guardian of these children, believing it would be detrimental to their moral and material interests.

*Livingstone* on behalf of the infants urged, that as administratrix, Mrs. Sheldrick had no control over the real estate; that the petition from the minors shows their desire that a guardian should be appointed; that it is unnecessary to assign any special reason, and that Mr. Hunter is their nearest of kin; that the 20 days' notice is proved by the affidavit on file, and that in consequence of the absence of the Judge on the day named in the notice, that counsel could not be heard, but that on the opening of Chambers on the following day, the further hearing was adjourned to this day.

Judgment was deferred until the 1st March, when the following judgment was delivered.

WILSON, Co. J.—Having carefully examined the Act relating to guardians, with the Rules and Orders framed by the Judges appointed under the 14th Section of the Surrogate Courts Act of 1858, and having also considered all the objections and arguments of counsel, I have come to the conclusion that the contesting party is not properly before the Court until she has filed a caveat. I threw out a suggestion to this effect, when the parties were before me on the 16th ult., but no caveat has yet been filed. The proper practice appears to me to be, that in the event of

the mother, or any one else objecting to the appointment proposed, it is for them to file a caveat with the Surrogate Registrar; then, when the application is made, the party contesting, must be warned to appear on some day to be named by the Judge, who will then hear the parties and decide the matter, either on affidavits, or he may take evidence *viva voce* if he thinks it advisable to do so.

With reference to the objection raised by Mr. Foley that by the printed and written notice, the application in this matter should have been made to me at my Chambers on Wednesday the 3rd of February, 1869, at 11 o'clock in the forenoon, and that as no such application was then made, therefore any subsequent application or proceeding would be irregular and illegal. I have no doubt that I had full power and authority to receive and entertain the application on the first day I was in Chambers, although this was after the day named in the notice. I had received no intimation of this appointment, neither had my convenience been consulted in any way, and if counsel will arbitrarily make appointments for me, they must submit to occasional disappointments. By the 3rd Section of the Act respecting the appointment of Guardians it is enacted, that after proof of 20 days' public notice of the application &c., the judge may appoint, &c. Now the usual form in such cases is to the effect that the person giving the notice, will apply to the Judge after the expiration of 20 days, &c., without naming any day or hour, and the application may in fact be made at any time after the period has expired, but even if a day has been named, (as in the present case), I am still of the opinion that it is immaterial whether the Judge is applied to on that particular day or not.

Several objections raised by Mr. Foley were overruled by me at the time, and as to his 7th, that no reasons have been assigned in the application for removing the minors from the care of their mother, I need only say that neither the Statute nor the Rules require such statement, and with reference to the objection that the appointment of Mr. Hunter would be detrimental to the moral and material interests of the infants, I can only repeat what I have already said, that to raise this issue properly, a caveat should have been filed as I suggested, when this allegation might have been fully investigated. In the absence of any evidence as to the unfitness of the proposed guardian, and from my own knowledge of his character and position in life, I am of opinion that Mr. Hunter, the paternal uncle, and next of kin should, on furnishing the necessary security, be appointed Guardian as prayed for.

The minors are of age to choose their own guardian, and the person of their choice, it appears to me, should be appointed, except it be clearly established, either that he is unfit, or that there are other good grounds of objection to his appointment. The second marriage of the mother, to a man who has children of his own, would in my opinion, constitute a good reason why *she* should not be appointed as guardian, but as she has made no application, and has filed no caveat, I must decide that the uncle, as next of kin, and the choice of the minors, is entitled to letters of guardianship.

The usual order was then made.

Co. Ct. Cases.]

NASH V. SHARP—BELLEVILLE V. FAHEY.

[Co. Ct. Cases.]

## COUNTY COURT CASES.

## WILLIAM NASH V. ANDREW SHARP AND OWEN SENATE.

(In the County Court of the County of Wentworth.)

*Overholding Tenants Act.*

The Overholding Tenancy Act of the first session of the Legislature of Ontario, gives jurisdiction to the County Judge in cases when the tenancy has been determined by forfeiture for breach of contract.

Service of the demand of possession must be personal; and service of notice of inquisition, must either be personal or at the place of abode of the tenant.

[Hamilton, November, 1868.]

The facts in this case were as follows. Sharp held under a lease for a term of years, terminating 1st March, 1869, and had paid all rent due up to 1st September, 1868. The landlord applied in November, under the Overholding Tenancy Act of the first session of the Province of Ontario, alleging a forfeiture of the lease for breach of covenant. The lease contained a proviso for making it void on non-performance of covenants by lessee, and the breaches complained of were, neglecting to fall plough 20 acres, to clear 24 acres newly seeded down in clover, taking straw off the premises and sub-letting or assigning the term to Senate. The lessee Sharp it was alleged had left the country. The demand of possession and notice of holding inquisition were served on Senate. Senate appeared and filed an affidavit denying the sub-letting or assignment of the term to him, and alleging that he was merely left in charge of the premises to take care of them for Sharp.

R. R. Waddell, for the landlord.

J. W. Ferguson, for the tenants, contended that the Act did not apply to cases where the lease was determined by forfeiture, and that service both of the demand of possession and notice of inquisition must be personal. He also denied the truth of the alleged breaches of covenant, and cited *Patton v. Evans*, 22 U. C. Q. B. 606; 9 U. C. L. J. 320; and referred to 10 U. C. L. J. 1.

LOGIE, Co. J.—I think that the Act of the first session of the Province of Ontario, gives jurisdiction in cases where the tenancy or right of occupation has been determined by a forfeiture for breach of covenant committed by the tenant. The second section gives the judge jurisdiction not only in cases where the tenancy has even determined by notice to quit, but also in all cases where it has been determined by any other act whereby a tenancy, or right of occupancy may be determined, or put an end to. These words are sufficiently comprehensive to include cases where the tenancy has been put an end to, or become void in consequence of any breach of covenant by the lessee.

One of the breaches of covenant complained of, and relied on as having made the lease void is the alleged sub-letting or assignment of the residue of the term to Owen Senate. If he had gone into possession as sub-tenant or assignee of the term, it is very doubtful if the Act against tenants wrongfully holding over would enable the landlord to put him out of possession, on the ground that there is no privity between them. Under the Act of 4 Wm. IV., it was expressly held that it did not apply to a case where there was

no privity between the owner of the land and the person in possession: *Bonser v. Boice*, 9 U. C. L. J. 213. Senate swears, however, that he is in possession under Sharp only for the purpose of taking care of the premises, and it is probably true that he has no legal right of occupancy. Then with regard to Sharp, two questions arise as to the sufficiency of the service on him: 1st, of the demand of possession, and 2nd, of the holding of this inquisition. In *Goodler v. Cook*, 2 Cham. Rep. 157, Sullivan, J. set aside the proceedings, on the ground that notice of the inquisition was not served personally on the tenant, he being at the time not resident on the premises. The clause under which that was decided is similar to section 4, of the Act of last session. If service of the notice of inquisition must be personal, or at the actual place of abode of the tenant, it seems to be much more necessary that service of demand should be personal; as the refusal to go out and reasons for the refusal, if given, must be stated in the application, which means to imply personal service.

I think, therefore, that service of the demand of possession must be personal, and that notice of the holding of the inquisition must either be served personally, or be left at the place of abode of the tenant; and that service on a person in possession of the premises, the tenant being resident elsewhere, is not sufficient. The application must be discharged for the reasons stated.

## THE CORPORATION OF BELLEVILLE V. FAHEY.

(In the County Court of the County of Hastings.)

*Promissory note—Consideration—Corporation—Demurrer.*

A promissory note, made payable to the Treasurer of, and endorsed by him to a Municipal Corporation to secure a balance due the Corporation on a past transaction is not void under the Municipal Acts.

SHERWOOD, Co. J.—The plaintiff in this case declares upon a promissory note made by the defendant to Thomas Wills, Treasurer of the Town of Belleville, and states that Wills, as Treasurer, endorsed and delivered the note to them.

The defendant demurs, and gives as a ground, that plaintiffs cannot legally contract by promissory notes, neither can they make, endorse, &c., or otherwise negotiate by or in promissory notes.

The only case I find bearing on this point, is that of the *Municipality of Westminster v. Foy*, 19 U. C. Q. B., 203. In that case the demurrer was sought to be sustained, on the ground that the corporation could not take more than 6 per cent. interest, if they could take interest at all. In the argument, the same or nearly the same objection was taken as in the present case, but inasmuch as it was taken at the argument, the court seemed to think it too late; but the learned Chief Justice in giving judgment remarked that, for all that appeared, the note sued on may have been given upon a transaction having nothing to do with banking or any kind of business prohibited, as for instance, money over paid to the defendant on a contract. He therefore was of opinion that a note given with such a consideration might be recovered. There are other matters besides these, such as rent, that would be a good consideration.

It does not appear here, that this note was given for a bad consideration, or in any kind of business prohibited to a corporation such as this,

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I cannot see that the note having been made to the treasurer. and by him endorsed to the plaintiff, would alter the case, and I must therefore hold that the plaintiffs can recover.

Judgment for plaintiffs.

## ENGLISH REPORTS.

### QUEEN'S BENCH.

#### FUENTES AND ANOTHER V. MONTES AND ANOTHER.

*Principal and agent—Factors Acts, 6 Geo. IV. c. 94; 5 & 6 Vic. c. 39—Authority of factor to pledge goods—Revocation.*

If a principal entrusts goods to a factor for sale, and afterwards revokes the authority and demands back the goods, the factor is not "entrusted with the possession of goods" under the Factor Act, and cannot make a valid pledge of the goods.

[Dec. 1, 1868, 17 W. R. 203.]

Appeal from a decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendants.

The facts of the case, with the material sections of the Acts of Parliament, are fully set out in 16 W. R. 900 (and see L. R. 5 C. P. 268).

*Pollock, Q.C. (Archibald with him),* for the defendants, referred to the same authorities in the court below.

*Sir. G. Honyman, Q. C. (Channell with him),* for the plaintiffs, was not called upon.

*COCKBURN, C. J.*—I think it is quite clear that the judgment of the Court of Common Pleas was right. Mr. Pollock has been obliged to admit that but for the last Act, 5 & 6 Vic. c. 30, he would have no *locus standi*. By the law as it stood before the passing of that Act a man could only deal with goods which he had in his possession as the owner of them, if it was not known that he had possession of them as agent; but by it the power of dealing goods was extended, and it was enacted that "any agent entrusted with the possession of goods, or of the documents of title to goods, should be taken to be the owner of the goods," for the purpose of protecting persons making *bona fide* advances even with the knowledge of the agency. Mr. Pollock has contended that the proper construction of that Act is, that if a man has once been an agent he is still an agent, though the agency has been put an end to by a communication from the principal unknown to the public; and in like manner that if a man has once been entrusted he is still entrusted, though his authority has been terminated in a similar way. I think that if that had been the intention of the Legislature it would have been so expressed, and that we must not translate the language of the Act which is in the present tense as if it were in the past tense.

*Kelly, C.B., Bramwell, B., Channell, B., Pigott, B., and Hayes, J.,* concurred.

#### DAW V. ELEY.

##### *Ex parte COLLETTE.*

*Contempt of Court—Publications by a solicitor in the cause of matters in the suit—Costs.*

A solicitor to a defendant in a suit wrote anonymous letters to a newspaper stating as facts the matters relied on by the defendant, which were in fact the issues which would have to be tried in the cause by a jury.

*Held,* that he was liable to be committed for contempt. The editor of the journal allowed the letters to be published

as part of a general controversy carried on in his columns, but refused to admit letters on the other side, and continued to publish the letters after he knew that the writer was a solicitor to the defendant.

*Held,* that he was not entitled to the costs of a motion to commit him, which was refused.

[Dec. 15, 1868, 17 W. R. 245.]

This was a motion to commit Charles Hastings Collette, the solicitor of the defendant in the suit, for contempt of court in publishing certain letters relating to matters in question in the suit.

There was also a motion to commit the editor of the *Volunteer Service Gazette* in which the letters had appeared.

The bill was filed early in the year 1868 to restrain the infringement of a patent obtained by the plaintiff for the manufacture of copper-cased cartridges for breech-loading rifles. The defence to the suit raised the issue of the novelty of the invention.

Some correspondence had been carried on in the *Volunteer Service Gazette* as to the respective merits of the various systems of manufacturing breech-loading cartridges, without any direct reference to the pending suit, or to the question of the priority of the invention of the copper-cased cartridges, and the number of the *Gazette* for the 26th of September contained a leading article merely discussing the general merits of the question. In the same issue, however, there appeared the first of a series of letters signed "Copper Cap." These letters expressly raised the questions in the suit, and asserted as facts the matters relied upon by the defendant in the suit. They referred to a provisional specification obtained by a Mr. Rochatte, of Paris, as being an anticipation of the plaintiff's patent, and stated that one portion of the cartridge called the "anvil," and claimed as new by the plaintiff, was only a modification of a system previously in use and introduced by a Mr. Pottet.

The plaintiff sent letters for publication to the *Volunteer Service Gazette*, in answer to the letters signed "Copper Cap," but the editor declined to insert them, alleging that they contained expressions which were wanting in due courtesy to those who supported the opposite contention. On inquiry it appeared that the writer of the letters signed "Copper Cap" was the solicitor of the defendant, and the plaintiff moved as above-mentioned.

*Jessel, Q. C., and Russell Roberts,* in support of the motion, contended that the publication of these letters was distinctly calculated to interfere with the due prosecution of the suit. The issues raised were as to questions of fact, and would have to be tried before a jury. The general public were largely interested in the question, and especially the Volunteers, who were the chief readers of the *Volunteer Service Gazette*, and some of whom it would be desirable to have upon the jury. They referred to *Tichborne v. Tichborne*, 15 W. R. 1072, and *Lechmere v. Charlton*, 15 Ves. 193, and to a similar recent motion\*

\*This was a motion made on the 12th November, 1868, to commit the editor of a Sheffield newspaper for an article in reference to the then pending Parliamentary election at Sheffield. The article set out portions of a bill of complaint filed against the directors of the Exchange Bank, one of whom was Mr. Roebuck. He was also one of the candidates for Sheffield, and the newspaper in question was conducted by his political opponents, and the article made use of the allegations of the bill for the purpose of injuring his candidature. Lord Romilly, M. R., held that

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by Mr. Roebuck against the editor of a Sheffield newspaper.

*Southgate, Q. C.*, and *Langley*, for Collette, contended that the letters had in fact no relation to the matters in dispute in the suit. Collette had taken a great interest in the question as a volunteer, and the letters were not such as would prejudice the mind of any person in reference to the suit.

*W. W. Karlake* appeared for the editor of the *Volunteer Service Gazette*, and contended that at all events the order ought not to go against him. He knew nothing at first about Collette's position in reference to the suit, and was not bound to refuse to allow a discussion in the columns of his newspaper of a matter of such general interest as that of the cartridges, or to insert every letter sent to him on the subject.

**LORD ROMILLY, M. R.**—I will read the letters before I dispose of the matter finally; but, as it strikes me at present, I think the conduct of Mr. Collette cannot be defended. The principle upon which all these cases are founded is quite established. It is that no person can be permitted to do anything with a view to pervert the sources or the proper flow of justice, or, in fact, to make, any publication or write anything which would be likely or might possibly induce the Court, or the jury, or the tribunal which might have to try a cause to come to any conclusion other than that which is to be derived from the evidence brought forward by the parties to it.

Certainly no one ought to be permitted to prejudice the minds of the public beforehand, by mentioning circumstances relating to a case. If that is done with the intention of perverting the ends of justice, it is unquestionable that the Court could stop it, and very often it will judge for itself what are the fair inferences to be derived from the publications which appear. But it must also go beyond this, and must stop the publication of these things where the evident result would be to affect the administration of justice, though that might not have been the intention of the person who did it. The main question in the present case is whether Mr. Collette was justified in writing the letter of the 26th of September, which is the first letter on the subject. There is a leading article on the same subject, but that does not say a word, as far as I have seen, on the priority of any invention, and does not even mention Daw's patent. But Mr. Collette's letter treats of nothing else, as it appears to me, with the exception of this at the beginning:—"The writer of the article in your last issue, under the heading 'The Cartridge of the New Military Rifle,' can have scarcely given the subject a practical consideration when he places the Daw cartridge in comparison with the present Boxer service cartridge, particularly when he says that the Daw cartridge approaches the first essential more nearly than the Boxer, the first essential being safety." If it had stopped there (and I am not now considering the position which Mr.

Collette filled), and had merely enlarged upon that subject, it might have been said that it was a fair discussion of the respective merits of two particular patents. But he says as to the portions of the cartridge claimed as new by Mr. Daw, that "they had all been in public use before Mr. Daw's patent of March, 1867," and that "a Mr. Rochatte, of Paris, in January, 1867, obtained a provisional protection" for a similar invention, and so on. What have these statements to do with the comparative merits of the two? He, further on, asserts that Mr. Daw in all his cartridges uses Snider's process. That is not a question of whether one is or is not better than the other. It is stating that Mr. Daw's patent is worth nothing because he is using an old process. Then he goes on, "This is in all respects similar to, 'Pottet's base arrangement,' except, that the 'anvil' is cylindrical and grooved up the side." There are things expressly stated in these letters to show that Daw's patent cannot be original. Then these letters are put in, not by a mere stranger who might say he really knew nothing at all about the suit, but by the solicitor to the defendant, who is opposed to Mr. Daw. Surely that is a very strong feature in the case. He must wish that his client should succeed, and it is impossible that he could write an article in a newspaper, which, if believed, must have a beneficial effect upon his client, and afterwards say, "I had no intention of that sort at all, however much I may wish for it." It must be regarded as an endeavour to interfere with the due administration of justice. Where is the line to be drawn? It is highly important that the Court should not allow steps of this sort to be taken by the officers of the court, in causes in which they are engaged, which possibly may have an effect favourable to their client, or unfavourable to the other side. I may further say that if I am to go minutely into every sentence of a letter which is written in a public newspaper, to say this is questionable, and that is doubtful, and the like, it is imposing a task and a duty upon the Court which it will be impossible to perform. There is one distinct line drawn, which is this, that gentlemen who are concerned for contending clients in this court, whether solicitors or counsel, should abstain entirely from discussing the merits of those questions in public print. If they do it at all they ought to put their names to their communications; but to let the public suppose that it is merely done by a person who takes a great interest in matters of this description, and has great knowledge of the subject, and that he discusses the question in a public point of view, when, if the fact were known, he is the solicitor of the defendant, and has the strongest possible interest in its success, appears to me conclusive upon that point.

**Dec. 14.**—**LORD ROMILLY, M. R.**—I have little to add to what I stated on Friday, when I explained the reason which induced me to take the course which I now intend to take. The perusal of the articles confirms me in the view I have taken, and it must be admitted by everybody to be an extremely improper thing for a solicitor in a cause to write an article in a paper which may either directly or indirectly be believed, and which may influence the suit upon which he is engaged. I do not believe it was done with any

the case came clearly within the rule in *Tichborne v. Tichborne*, the only difference being that the newspaper articles in that case were calculated to prejudice the public mind in reference to the suit, and so injuriously affect the complaining parties; while in *Mr. Roebuck's case* the allegations of his opponents in the suit were used to damage his position as an individual.—**ED. W. R.**

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improper motive, but it was done with great want of judgment. My opinion from reading these papers and the comments and the remarks in the anonymous publication in the *Volunteer Service Gazette* is that it has the direct effect of influencing the suit, and therefore I am obliged to make the order that I have been obliged to make on former occasions, and which was made by the present Lord Chancellor in *Tichborne v. Tichborne*. I shall make the same order as before, but I shall direct that it shall not be acted upon for a fortnight, to allow Mr. Collette to take the opinion of a superior tribunal upon the subject, or to make an apology and pay the costs of the motion. It appears to me, to say the least of it, a serious error of judgment on the part of Mr. Collette, and it is necessary that the Court should interfere.

When I look at the case of the editor, I think that he did not show quite the forbearance towards Mr. Daw that he might have done, considering how materially interested Mr. Daw was, and that he might have made some little excuse for the warmth Mr. Daw showed upon the subject. At the same time there is nothing against the editor for which I can require him either to make an apology or to pay the costs of the motion, but I cannot give him costs: that is out of the question. He has certainly shown a tendency to decide against Mr. Daw. I also feel for the difficult position in which an editor is placed in such cases; but with respect to him I can make no order. The order as to Mr. Collette is that he stands committed for contempt of this court, and I desire that the order shall not be enforced for a fortnight.

Dec. 16.—Lord ROMILLY, M.R., said that there seemed to have been some misapprehension as to his judgment in reference to this matter. It seemed to have been supposed that the effect of the judgment would be to prevent a free discussion of the merits of inventions or anything of that description in the newspapers. That was not his intention. The question to be determined in the suit was whether Mr. Daw's invention was new, and the reason he refused the editor his costs was that after he had notice that the gentleman who wrote the anonymous paper was the solicitor to the defendant, he published another letter from him which had nothing to do with the merits of Mr. Daw's invention, and had refused to allow Mr. Daw to defend in his paper the novelty of the invention.

## WITHINGTON v. TATE.

*Mortgage—Transfer—Redemption—Payment to party not authorised to receive—Loss by defaulting solicitor—Estoppel.*

A mortgage was transferred to the plaintiff without notice to the mortgagors, who were trustees for a charity, and they afterwards repaid the principal of the debt to the solicitors of the mortgagee and the plaintiff, who had always received the interest on the debt on their behalf. A deed was executed by the mortgagee purporting to be a reconveyance, but there was no endorsed receipt, and it appeared that the mortgagee believed the deed only to be an appointment to new charity trustees. The solicitors did not communicate the fact of the payment to the plaintiff, and the money was lost by their default.

*Held*, that the plaintiff was not bound to give notice of the transfer to the mortgagors, and the payment was not a payment to him, and, as he had the legal estate, he was entitled to foreclose.

[M. R. 17. W. R. 247.]

The question to be determined in this suit was as to how a loss occasioned by a defaulting solicitor should be borne.

By a deed dated the 7th of July, 1858, the defendants, who were the trustees of a charity, mortgaged the charity property to Messrs. Nixon & Thew, of Liverpool, to secure £1,400 and interest.

By an indenture dated the 1st of January, 1864, to which the defendants were not parties, Messrs. Nixon & Thew transferred the mortgage to the plaintiff.

Messrs. Stockley & Wrigley, of Liverpool, were the solicitors both of Messrs. Nixon & Thew and of the plaintiff, and the interest on the mortgage money was always paid by the defendants to them for Messrs. Nixon & Thew. They did not give notice to the defendants of the transfer, but continued to receive the interest for the plaintiff as they had done for Messrs. Nixon & Thew.

The documents of title, including the original mortgage, remained at their office, and after the transfer was executed it remained there also.

In the early part of 1864 the defendants gave notice to Messrs. Stockley & Wrigley of their intention to redeem, and on the 15th of August, 1864, one of them attended at their office and paid the sum of £1,438 6s 5d.

Upon this payment Messrs. Stockley & Wrigley gave the defendants a receipt in the following form:—

“Rev. Dr. Briggs and others to Nixon & Thew.

	£	s.	d.
To amount of principal....	1,400	0	0
Interest on ditto from February 8 to August 15—			
194 days, at 5 per cent.....	£37	4s.	1d.
Less tax..	19s.	8d.	36
Costs.....			2
			2
			0

£1,438 6 5

Received one thousand four hundred and thirty-eight pounds six shillings and five pence.

STOCKLEY & WRIGLEY.”

15th August, 1864.

Messrs. Stockley & Wrigley thereupon handed over to Robert Chapman, one of the defendants, all the deeds and documents of title except the transfer to the plaintiff, and he sent them, together with the above mentioned receipt, to the defendants' solicitor with instructions to prepare a reconveyance of the mortgaged property. After some delay the draft was agreed to by the respective solicitors of the defendants and of Messrs. Nixon & Thew, and the deed was executed. It bore date the 31st of September, 1864, and purported to reconvey the property in question to the present defendants as trustees for the charity, discharged of the mortgage debt, and contained a recital that the defendants had repaid to Nixon & Thew the principal and interest of the mortgage debt, and a covenant by them that they had not incumbered. No receipt for the mortgage money was endorsed on the deed, and Messrs. Nixon & Thew stated that they executed the deed in the belief that it was necessary to complete the title of some of the defendants who

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had become trustees of the charity since the date of the mortgage deed, and had nothing to do with the mortgage. Messrs. Stockley & Wrigley never communicated to the defendants the fact of the transfer of the mortgage, or to the plaintiffs the payment of the mortgage money or the execution of the last-mentioned deed, and continued to pay interest on the mortgage debt to the plaintiff till the 3rd of August, 1867.

At the close of the year 1867, Mr. William Stockley, one of the partners in the firm of Stockley & Wrigley, absconded, and Mr. Wrigley, who was the only other partner at the time of the repayment of the mortgage debt, afterwards became bankrupt.

The plaintiff then first heard of the repayment by the defendants, and, after ascertaining from Messrs. Nixon & Thew that they did not know of it till after Mr. Stockley absconded, filed the bill in the present suit, which was in the ordinary form of a foreclosure bill.

*Southgate, Q. C.*, and *Robinson*, for the plaintiff, said that there had been no payment to the person entitled to receive the mortgage money. The plaintiff was in possession of the legal estate, and entitled either to be paid off or to foreclosure.

*Sir R. Baggallay, S. G.*, and *Bagshawe*, contended that where there is a transfer of a mortgage and no notice of the transfer given to the mortgagor, a payment to the transferee is a valid discharge. The plaintiff by his acts had allowed Messrs. Stockley & Wrigley to be treated as his agents for the receipt of the purchase money. They referred to *Williams v. Sorrell*, 4 Ves. 389; *Matthews v. Wallwyne*, 4 Ves. 118; *Norrish v. Marshall*, 5 Madd. 475; *Stocks v. Dobson*, 4 D. M. G. 11.

*Southgate*, in reply.

LORD ROMILLY, M. R.—I think this is a very clear case. A mortgagee assigns his mortgage to a stranger for value, and the transferee gives no notice to the mortgagor. That does not prevent him from filing his bill for foreclosure. The only effect of his not giving notice is to prejudice him in respect to any question of priority. If the answer to this bill had been that the defendants had paid the mortgages and got a reconveyance from them, that might have been a good defence. But that is not the present defence. Here the mortgagor goes to the solicitor of the mortgagee and transferee, and gives six months' notice to pay off the mortgage debt. At the expiration of the six months he goes and pays the principal to the solicitor, and gets a receipt from him. There is no receipt from the plaintiff, who never received anything. The deed cannot affect him; it could only affect the mortgagee by estoppel, and that would not effect the plaintiff. For estoppel is where one is prevented by something he has done from stating the truth, and can only affect the person who is estopped. In this case if the deed operated by estoppel it could only prevent Messrs. Nixon & Thew from denying that the money was paid. But in this court it is never considered that a deed is evidence of money having been paid without an endorsed receipt. The deed really amounts only to an appointment to new trustees, and vests the property in them. The plaintiff has the legal estate, and all I can do is to make the ordinary foreclosure decree, and it may be

remarked that this question would have come properly for determination on taking the account, because nothing can come into the account except what has been duly paid to the mortgagee or transferee, or to some person by his order.

## CHANCERY.

### HOLT V. SINDREY.

*Will—Gift to children begotten or to be begotten—Illegitimacy unknown to testator—Description—Provision for future illegitimate children.*

A testator bequeathed trust funds to M., whom he believed to be the lawful wife of L., for life, with remainder to all her children begotten or to be begotten equally.

M. had by L. four children born or in case at the date of the will, and three born afterwards, all illegitimate.

Held, that the children begotten at the date of the will were sufficiently described, and took the fund; but as to those born afterwards, the gift was a provision for future illegitimate children, and therefore failed.

[V. C. S. 17 W. R. 249.]

William Holt, the testator in this petition, by his will, dated in the year 1827, directed his trustees, after the decease or second marriage of his wife, to stand possessed of so much of certain funds as would produce the sum of £35 a year upon trust during the life of his daughter Mary, the wife of John Lattimer, for her sole use, exclusive of her then present or future husband, and after the death of his said daughter, to pay the same unto all and every the child or children of his said daughter begotten or to be begotten, in equal shares, if more than one, and if there should be but one such child then the whole to be in trust for such one child, and to be vested in the same children when they attained the age of twenty-one years or died under that age leaving issue; and in case there should not be any such child of his said daughter Mary Lattimer, or in case all such children, if any, should die under the age of twenty-one years without leaving issue, then the testator gave the trust fund in trust for other persons.

The testator died in the year 1828, and his widow in the year 1831.

The chief clerk's certificate upon a decree for the administration of the testator's estate had certified that Mary Lattimer, then Mary Holt, spinster, was on the 4th of May, 1817, married to J. C. Fleely, but there was not any issue of the marriage, as the parties had separated immediately after the ceremony, and they never met again; also that J. C. Fleely died in July, 1850; also that on the 31st of January, 1818, Mary Fleely, as Mary Holt, was married to John Lattimer, and that of that marriage seven children were the issue, all of whom were born before the death of J. C. Fleely. John Lattimer died on the 23rd of October, 1850.

By an order of the Court made in the year 1858 the trust fund, which was then represented by a sum of Bank Annuities, was carried over to the account of "the legacy of Mary Lattimer, her children, and their incumbrances," and the dividends were ordered to be paid to Mary Lattimer during her life.

Mary Lattimer died on the 29th of August, 1868, without having had any lawful issue, and a petition was presented by some of the parties entitled under the testator's will to the trust



fund in the event of there being no children to take under the bequest.

The evidence showed that the marriage between J. C. Fleely and Mary Holt was never consummated, and that the marriage took place without the knowledge of, and was never made known to, the parents of Mary Holt; also that four of the children of Mary Lattimer by John Lattimer were born or *in esse* at the date of the testator's will; the other three children were born after that date. The testator knew that his daughter had no other children except those by Lattimer.

*Hinde Palmer, Q. C.*, for the children of Mary Lattimer, claimed the fund for the four elder, though he admitted though the three younger could not take. The children illegitimate, were sufficiently described.

*Greene, Q. C.*, and *Renshaw*, for the parties entitled under the gift over, contended that the gift over had taken effect.

*Bagshawe, Fischer*, and *Langley*, for parties in the same interest.

The following cases were referred to:—*Howarth v. Mills*, L. R. 2 Eq. 389; *Warner v. Warner*, 16 Jur. 141, 1 Sm. & Giff. 126; *Pratt v. Mathew*, 4 W. R. 418, 22 Beav. 340; *Re Herbert's Trusts*, 8 W. R. 660, 1 J. & H. 121, 8 W. R. 660; *Godfrey v. Davis*, 6 Ves. 43; *Kenebel v. Scrafton*, 2 East, 530; *Harris v. Lloyd, T. & R.* 310; *Re Overhill's Trusts*, 1. W. R. 208, 1 Sm. & Giff. 362; *Re Well's estate*, 16, W. R. 784, L. R. 6 Eq. 599.

**STUART, V. C.**—In order that any legatees may take, whether as a class or individuals, it is necessary that they should be clearly described. When there is a gift to a child or children as a class, legitimate children are understood, but if the object is clearly defined, it matters nothing whether the object be legitimate or illegitimate. In the construction of wills, however, the primary and proper signification of every word must be attended to. It is contended in the present case that the gifts to the child or children of the testator's daughter begotten must altogether fail. I think that the testator understood and thought that his daughter was the wife of Lattimer, and his lawful wife. In his will he refers to children begotten, so he knew that children were born, and the fact that were illegitimate seems to have nothing to do with the question whether they are sufficiently described when it is certain that there are none other than the children by the marriage with Lattimer. The words of the will are clearly intelligible, and I know that the testator intended children begotten of the marriage with Lattimer. In cases of this description fallacies are occasioned by the use of two words which require very accurate definition, namely, "children" and "class." If children are properly described as a class there is no rule to say that illegitimate children shall not take; this runs through every case except *Beachcroft v. Beachcroft*, 1 Mad. 430, and *Fraser v. Pigott*, 1 Yo. 354. The cases relied upon by the parties objecting to this gift are clear authorities in favour of gifts to persons clearly described. In *Godfrey v. Davis* (*supra*) it was decided that if there were no other children than illegitimate children to answer the description they must take, although in point of law they do not stand as children. This shows that there can be a valid gift to ille-

gitimate children under the description as children begotten during the testators lifetime. *Pratt v. Mathews* (*supra*) and *Cowden v. Parks* (*supra*) were cases in which the gift was to children to be begotten, and it is against the policy of the law to allow such a gift, but a gift to a child begotten but unborn is valid although the child be illegitimate. There is, however, one point in this case which might raise a doubt, namely, the use of the word "such" in a subsequent part of the will, where it directs the interest to be vested when the children arrive at the age of 21, and makes further provisions in case there should not be any such children. I do not entertain any doubt upon the construction of the will as to the children begotten or the one *en ventre sa mere* at the time of the testator's death.

## DIGEST.

### DIGEST OF ENGLISH LAW REPORTS.

FOR AUGUST, SEPTEMBER AND OCTOBER, 1868.

(Continued from page 52.)

#### LACHES

A continual claim, without any active steps in support of it, will not keep alive a right which would otherwise be barred by laches.—*Lehmann v. McArthur*, Law Rep. 3 Ch. 496.

#### LANDLORD AND TENANT.

1. It is not necessary to the validity of a notice to quit, given by the general agent of a landlord to a tenant, that the agency should appear on the face of the notice.—*Jones v. Phipps*, Law Rep. 3 Q. B. 567.

2. M being yearly tenant to the plaintiff, under a written agreement, the defendant in consideration of the plaintiff's continuing M as such tenant, gave to the plaintiff a guaranty for "the rent of the L farm, in the occupation of M." The plaintiff afterwards gave M notice to quit, but withdrew it before the expiration of the current year. Next year the rent was in arrear, and the plaintiff brought suit on the guaranty. *Held*, that the old tenancy was determined by the notice to quit; that the guaranty applied only to the tenancy in existence when it was given; and that the defendant was not liable.—*Tayleur v. Wilden*, Law Rep. 3 Ex. 303.

3. By a lease of a house and grounds, the landlord undertook to keep the premises in repair, and to pay all taxes and charges payable in respect to the premises. In the grounds was a piece of ornamental water, in which, during the tenancy, an accumulation of mud caused a nuisance to the tenant and to the public. The tenant being summoned under the Nuisances Removal Act, 1855, employed a con-

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tractor to clear the water to the satisfaction of the inspector of nuisances. Afterwards, an order was made on him to abate the nuisance. The whole of the mud was cleared out, under the contract, part before and part after the date of the order. *Held* (1), that the landlord was not, under his agreement to repair, bound to cleanse the water; (2) that no charge on the premises, in respect to any part of the work done, had been created by the proceedings under the Nuisances Removal Act.—*Bird v. Elwes*, Law Rep. 3 Ex. 225.

4. In a lease, the lessee covenanted not to assign without license, and the lessor covenanted not to withhold his license unreasonably or vexatiously. The lessee contracted to assign his lease to the plaintiff, "subject to the landlord's approval." The lessor refused to give his license, not from any objection to the proposed assignee, but because he wished to buy up the lease for the purpose of rebuilding. The lessee, having failed to obtain the license, surrendered the lease to the lessor for the same price for which he had agreed with the plaintiff. In a bill by the plaintiff against lessor and lessee for specific performance of the contract to assign: *held*, that the lessee was not bound to take legal proceedings to oblige the lessor to give his license, and that, having used all reasonable efforts to induce the lessor to consent, he was at liberty to consider the contract at an end, and to make his own terms with the lessor. Whether the lessor's refusal was unreasonable or vexatious, *quære*.—*Lehmann v. McArthur*, Law Rep. 3 Ch. 496.

*See* FRAUDS, STATUTE OF, 1.

LEASE—*See* LANDLORD AND TENANT.

LEGACY—*See* DEVISE; HEIRLOOM; NEXT OF KIN;

POWER, 2; REVOCATION OF WILL; TRUST;

VESTED INTEREST.

LICENSE—*See* LANDLORD AND TENANT. 4.

MARRIAGE—*See* DIVORCE, 2.

MARRIAGE SETTLEMENT.

A marriage settlement contained a covenant to settle on the trusts of the settlement all the estate which the wife was, at the date of the settlement, or should during the coverture become, seised or possessed of, or entitled to at law or in equity. At the time of the deed, and during the whole time of the coverture, the wife was entitled to an estate tail in remainder after other estates tail. *Held*, that it was not within the covenant.—*Dering v. Kynaston*, Law Rep. 6 Eq. 210.

*See* POWER, 2.

MARRIED WOMAN—*See* HUSBAND AND WIFE.

MASTER—*See* FREIGHT, 2; SHIP, 2, 3.

MASTER AND SERVANT.

The defendant was engaged in constructing a sewer, and employed men, with horses and carts. The men were allowed an hour for dinner, but were directed not to go home or to leave their horses. One of the men, however, went home, about a quarter of a mile out of the direct line of his work, to dinner, and left his horse unattended in the street before his door. The horse ran away, and injured the plaintiff's fence. *Held*, that the jury were justified in finding that the man was acting within the scope of his employment.—*Whatman v. Pearson*, Law Rep. 3 C. P. 422.

MISREPRESENTATION.

It is not sufficient, in a bill praying to be relieved from a contract for shares in a company on the ground of its being induced by misrepresentation in a prospectus, to allege generally that the prospectus contained false statements, by which the plaintiff was deceived and drawn into the contract; but the precise misrepresentation must be distinctly stated, and also that it formed a material inducement to the plaintiff to take shares.—*Hallows v. Fernie*, Law Rep. 3 Ch. 467.

MORTGAGE—*See* FIXTURES; FOREIGN COURT;

FREIGHT, 1; PRIORITY, 2-5; SHIP, 2.

NECESSARIES—*See* HUSBAND AND WIFE, 1.

NEGLECT—*See* ACTION; MASTER AND SERVANT;

RAILWAY, 1; SHIP, 1.

NEXT OF KIN.

A testator gave a legacy to A for life, and, in default of issue, to "her next of kin in blood, as if she had died unmarried." A died without issue. *Held*, that the only surviving sister of A was entitled to the legacy, in exclusion of children of deceased brothers and sisters; for that the words, "as if she had died unmarried," did not point to the mode of distribution in cases of intestacy, and that, therefore, "next of kin" meant nearest relations, and not persons entitled as next of kin under the Statute of Distributions.—*Halton v. Foster*, Law Rep. 3 Ch. 508.

NOTICE—*See* LANDLORD AND TENANT, 1, 2; PRIORITY, 1.

NUISANCE—*See* WAY, 2.

NULLITY OF MARRIAGE—*See* DIVORCE, 2.

PARENT AND CHILD—*See* HUSBAND AND WIFE, 1.

PAROL EVIDENCE—*See* FRAUDS, STATUTE OF, 1.

PARTIES—*See* HUSBAND AND WIFE, 3; WAY, 2.

PARTNERSHIP.

The plaintiff, being entitled to a fund in court, gave the firm of solicitors who had acted

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for him in the matter a joint and several power of attorney to receive the money. The plaintiff sent the power to B, one of the firm, who, under it, received the money, signed the receipt in his own name, paid the money into his private bank account, and soon afterwards absconded with it. The letters on the subject of the power and the cost of stamping it were charged in the bill of costs of the firm. On a bill seeking to make S, the other partner, liable to repay the money, but not praying an account, *held* (1), that there was jurisdiction at equity; (2) and that S was liable for repayment of the amount, with interest.—*St. Aubyn v. Smart*, Law Rep. 3 Ch. 646.

PART-OWNER—*See* SHIP, 2.

PAWN—*See* PLEDGE, 1.

PLEADING—*See* ACTION, 1.

## PLEDGE.

1. A, a holder of scrip certificates for shares, borrowed money of the defendant, and deposited with him the certificates as security. He afterwards became bankrupt, and the defendant, without demand and without notice, sold the shares to repay himself. A's assignee, without making any tender of the amount of the debt, brought trover to recover the value of the shares. *Held*, that, even assuming the sale to be wrongful, the right to possession was not by the sale vested in the plaintiff, and that he could not maintain trover either for the value of the shares or for nominal damages.—(Exch. Ch.) *Halliday v. Helgate*, Law Rep. 3 Ex. 299.

2. A, a stock broker, borrowed, on behalf of the plaintiff, a sum of money for three months, from the defendant, also a stock broker, on the security of certain railroad stock which was transferred by the plaintiff into the name of the defendant. At the end of the three months the plaintiff repaid the loan; and the defendant, who had sold the plaintiff's stock, purchased other stock and retransferred a similar amount to the plaintiff. The plaintiff claimed to be entitled to the amount of profit that the defendant had made. *Held* (1), that the plaintiff could sue as principal; (2) that the defendant was not justified, either by law or by the custom of the stock exchange, in parting with the security, but was bound to restore the identical stock pledged; and that the plaintiff was entitled to recover the profit made by the defendant.—*Langton v. Waite*, Law Rep. 6 Eq. 165.

## POWER.

1. A power for setting up children in business does not justify trustees in making advances to

a married daughter for the purpose of paying her husband's debts. But an advancement for setting up a married daughter in the farming business, her husband covenanting that the business should be for her separate use, is a good execution of the power.—*Talbot v. Marshfield*, Law Rep. 3 Ch. 622.

2. A testatrix, having a general power of appointment over personal property, by her will, made after the Wills Act, directed her executor to pay her debts and funeral expenses out of her personal estate; she then gave several pecuniary legacies, with a direction that they should abate ratably, if, after payment of her debts and funeral expenses, there should not be sufficient to pay them in full; and she gave the residue of her estate to certain persons. *Held*, that the will was an execution of the power in favor of the executor, for the purpose of paying the testatrix's debts, funeral expenses, and legacies, and that only what remained, after making those payments, passed by the residuary bequest.—*Wilday v. Barnett*, Law Rep. 6 Eq. 193.

3. By a marriage settlement, reciting only the intended marriage, and that the wife's property should be settled to the uses after mentioned, her freeholds were conveyed to her use for life, remainder to the husband for life, remainder to such uses as the wife should appoint, and, in default of appointment, to uses in favor of the issue of the marriage. The wife covenanted to surrender her copyholds "to the uses hereinbefore expressed" concerning the freeholds. *Held*, that the power of appointment was general, and could not be restricted to a power to appoint to issue, and that the covenant made the copyholds subject in equity to the same power of appointment as the freeholds, though powers were not expressly referred to in the covenant.—*Minton v. Kirkwood*, Law Rep. 3 Ch. 614.

*See* REVOCATION OF WILL, 1.

PRACTICE—*See* APPEAL; INTERROGATORIES, 2.

## PRESCRIPTION.

1. From 1808 to 1854, the fee paid on a marriage in a certain church was almost uniformly 1s. There was no evidence before 1808. On a special case, in which the court were at liberty to draw inferences of fact: *held* that the amount of the fee, being so great that it could not have existed in the time of Richard I., was sufficient to rebut the presumption, from modern enjoyment, that the fee had an immemorial legal existence (KEATING, J., *dissentiente*).—(Exch. Ch.), *Bryant v. Foot*, Law Rep. 3 Q. B. 497.

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2. A claim by prescription to a toll in a market of 1s. on every wagon may be sustained as a claim to a reasonable toll, which might vary in amount with the value of money.—(Exch. Ch. reversing the decision of the Queen's Bench), *Lawrence v. Hitch*, Law Rep. 3 Q. B. 521.

PRINCIPAL AND AGENT—See LANDLORD AND TENANT, 1; MASTER AND SERVANT; PLEDGE, 2; SHIP, 3.

PRINCIPAL AND SURETY—See LANDLORD AND TENANT, 2.

## PRIORITY.

1. A trustee, a solicitor, saw in a newspaper the notice of a petition in insolvency by his *cestui que trust*, and acted on the information. *Held*, under the circumstances, that a subsequent assignee of the *cestui que trust*, who had given to the trustee formal notice of the assignment to him, did not thereby acquire priority over the assignee in insolvency, who did not give formal notice till afterwards.—*Lloyd v. Banks*, Law Rep. 3 Ch. 488.

2. A having made a mortgage to B, and a subsequent equitable charge in favor of the plaintiff, requested the defendants to pay off the first mortgage. This was done, a discharge by B was endorsed on the first mortgage, and the title deeds handed to the defendants, and A at the same time executed a mortgage to the defendants, who had no notice of the plaintiff's charge. *Held*, that the defendants had the better equity, and therefore that the rule, *Qui prior est tempore potior est jure*, did not apply, but that the defendants could not tack a further advance which they had made at the time of paying off the first mortgage, and which was included in the mortgage to them.—*Pease v. Jackson*, Law Rep. 3 Ch. 576.

3. A trustee of funds, invested in a mortgage in his name, deposited the deeds, without notice of the trust, to secure an advance to himself. *Held*, that the *cestuis que trust* were entitled to priority over the equitable mortgagee, and to delivery up of the deeds.—*Newton v. Newton*, Law Rep. 6 Eq. 185.

4. A ship owner, having mortgaged the ship to T. subsequently effected a charter party on her, the freight to be paid "on unloading and right delivery of the cargo, as customary," and "freight to be collected by the charterers." During the voyage, the owner assigned the freight under this charter party to B. The ship arrived, and most of the cargo, which was a general one, was delivered to the consignees; but, before the whole had been delivered, T took possession. *Held*, that T, having taken

possession before any freight had become payable from the charterers to the owners, was entitled to the freight, in priority to B.—*Brown v. Tanner*, Law Rep. 3 Ch. 597.

5. The owner of a ship mortgaged it to G, who transferred it to W by way of sub-mortgage; both the mortgage and the transfer were registered. In March, 1865, G paid off W's sub-mortgage, but the mortgage was not retransferred. In May, 1865, the mortgagor gave G another mortgage to secure an amount which included the money due on the original mortgage, and this mortgage was registered. In October, 1865, the second mortgage was transferred to B. In March, 1866, G agreed that W, who had no notice of the transfer to B, should hold the original mortgage, to secure an account current between them, and in July, 1866, B registered his transfer. *Held*, that as W became, in March, 1865, a trustee of the original mortgage for G, and as the money secured by it was included in the subsequent mortgage which was transferred to B before the new agreement with W, B had priority over W.—*Bell v. Blyth*, Law Rep. 5 Eq. 201.

PROMISSORY NOTE—See ALTERATION; DISCHARGE. RAILWAY.

1. A railway company are bound to take every reasonable care to prevent danger to their passengers from cattle coming on to the line, but they are not bound to maintain fences sufficient to keep the cattle off the line under all circumstances.—*Buxton v. N. E. Railway Co.*, Law Rep. 3 Q. B. 549.

2. Where a railway company have diverted a road, *ultra vires*, but with a *bona fide* view to the convenience of the public, a court of equity will not compel them to replace the road, if the result will be to cause greater inconvenience to the public or to the complaining section of the public. In such a case, an information was dismissed, but without prejudice to a proceeding at law.—*Attorney General v. Ely, &c., Railway Co.*, Law Rep. 6 Eq. 106.

See ACTION, 2; ULTRA VIRES.

REMAINDER—See DEVISE.

REPEAL OF STATUTE—See STATUTE, REPEAL OF.

RES ADJUDICATA—See DIVORCE, 1.

REVOCATION OF WILL.

1. A testator, having a power to charge certain land with £7,000, to be divided among his children as he should appoint, and, in default, among them equally, by his will charged the land with the £7,000, and directed that £4,000, part thereof, should be paid to his son, and the remainder to his three daughters equally. By

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a codicil, he revoked this charge, and charged the same land with £7,000, to be paid to his son alone. *Held*, that, though the appointment by the codicil was invalid, the revocation took effect.—*Quinn v. Butler*, Law Rep. 6 Eq. 225.

2. A testatrix gave to A, for life, the interest of £300, or thereabouts, invested by her in a certain company, and the interest of £200; and after A's death, she gave the "said principal sum of £500" to A's children, and directed, if her personal estate proved insufficient for the payment of legacies, that the deficiency should be made up out of her real estate. By a codicil, she gave "all her personal estate" to B. *Held*, that the whole personal estate passed by the codicil; that the legacy of £300 was specific, and was revoked; but that the legacy of £200 remained charged on the real estate.—*Kermode v. Macdonald*, Law Rep. 3 Ch. 584.

SALE—See COMPANY, 4; FRAUDS, STATUTE OF, 2.

SERVANT—See MASTER AND SERVANT.

SET-OFF—See BANKRUPTCY, 2.

## SHIP.

1. The provision in the 17 & 18 Vict. c. 104, sec. 299, that a loss arising from the non-ob servance by a ship of the rules laid down in the act, shall be deemed to have been occasioned by the wilful default of the person in charge of the deck, does not render an unintentional breach of the rules, barratry.

A collision arising from the negligence of the crew is not damage of the seas, within the meaning of an exception in a bill of lading.

Therefore, where a ship owner, by bill of lading, undertook to deliver goods safely, "barratry of master or mariners, accidents or damage of the seas or navigation excepted," and the ship came into collision with another by violating the rules of the above act, and sank, the ship owner was held liable for the loss of the goods.—*Grill v. General Iron-Screw Collier Co.* (Exch. Ch.) Law Rep. 3 C. P. 476.

2. The master's lien, under 24 Vic. c. 10, on the freight for his wages and disbursements, in priority to the claims of a mortgagee, is not affected by his being part owner of the vessel.

In a suit against ship and freight by a master, for disbursements, in priority to mortgagees in possession, the following items were allowed: (1) For tobacco and slops supplied to seamen who had deserted, notwithstanding the master may have made a small profit on them; (2) for some amounts which had not been paid, no order for the payment to be made till the master gave satisfactory evidence that the amounts had been paid; (3) for a bill of exchange,

drawn by the master, which had been dishonored, though he had received no notice of the dishonor.—*The Peronia*, Law Rep. 2 Adm. & Ecc. 65.

3. Ship owners entered into a charter party, by which it was provided that the master should be appointed by them, be under their control, and be dismissed by them, but that his wages should be paid by the charterer, and also that the master should act as supervisor of the repairs and fittings of the ship. *Held*, that they were liable for necessities supplied to the ship by the master's order.—*The Great Eastern*, Law Rep. 2 Adm. & Ecc. 88.

See FOREIGN COURT; FREIGHT; GENERAL AVERAGE; INSURANCE; PRIORITY; STATUTE, REPEAL OF; STOPPAGE IN TRANSITU.

SOLICITOR—See ATTORNEY; PARTNERSHIP.

## SPECIFIC PERFORMANCE.

1. An agreement for renewal of a lease provided for the tenant doing certain specified works, and "other works," on the property, and estimated the expense at from £150 to £200. The specified works were such as must evidently cost nearly that sum. *Held*, that there was no such uncertainty as to prevent specific performance.—*Baumann v. James*, Law Rep. 3 Ch. 508.

2. A agreed in writing with B, to transfer to him the unexpired term of a lease held by A of land and houses at S, and to build or finish certain houses thereon; to proceed with the building at once; and to consult B's wishes in building the houses then in progress, and in building other houses not then commenced. B agreed to take the term, and to pay a certain rent. Both parties agreed that a proper contract should be drawn for their mutual execution, by a certain solicitor. No such contract, however, was executed. Possession was given, and the buildings altered by A at B's instance. *Held*, having regard to surrounding circumstances, and to a part performance by A, that the agreement was not so vague but that specific performance ought to be decreed at the suit of A.—*Oxford v. Provan*, Law Rep. 2 P. C. 135.

See COMPANY, 4; FRAUDS, STATUTE OF, 2; LANDLORD AND TENANT, 4.

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

## STATUTE, REPEAL OF.

The Merchant Shipping Act, 1854, provides that no ship owner shall be answerable for any damage occasioned by the fault of a pilot, where the employment of such pilot is compulsory. A subsequent act, passed in 1857, provides that the owner of any ship navigating

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the Thames shall be answerable for all damages done by the ship, or by any of the boatmen or other persons belonging to or employed about the same, to any of the property of the Thames conservators, and that the boatmen or other persons so offending shall be answerable for and shall repay all such damages to the ship owner. *Held*, that the general enactment in the later statute did not repeal the particular enactment in the earlier statute.—*Conservators of the Thames v. Hall*, Law Rep. 3 C. P. 415.

## STOPPAGE IN TRANSITU.

A, in Sweden, agreed to sell goods to B, in London; B chartered a ship to fetch the goods, and insured them. The goods were damaged during the voyage, and, before they arrived in England, B had failed, and A thereupon had given notice of stoppage in transitu. *Held*, that A was entitled, as against the other creditors of B, to the proceeds of the sale of the goods, but not to money paid for the damage by the insurers.—*Berndtson v. Strang*, Law Rep. 3 Ch. 588.

See FREIGHT, 2.

SURETY—See LANDLORD AND TENANT, 2.

TAIL, ESTATE IN—See MARRIAGE SETTLEMENT.

TROVER—See PLEDGE, 1.

## TRUST.

A testator gave £2,300, bank annuities, to trustees, on trust to pay his debts, if his ready money was insufficient, and to hold the residue on trust to pay the dividends to his wife during her life, and, after her death, to sell the fund and also his household furniture, and out of the proceeds and of all other his personal estate to pay seven legacies, amounting to £1,075, and to pay the residue to A. The testator died in 1832, and his estate was administered, and no part of the £2,300 bank annuities being required for payment of debts, the whole was transferred into the names of the trustees. Both trustees died, and the administrator of the survivor embezzled the greater part of the fund, so that only £716 were forthcoming. The widow died in 1862. *Held*, that, there having been no consent of the legatees to the special appropriation of the fund, the residuary legatee could take nothing till all the pecuniary legatees had been paid.—*Baker v. Farmer*, Law Rep. 3 Ch. 537.

See COMPANY, 2, 3; POWER, 1; PRIORITY, 1, 3.

## ULTRA VIRES.

A railway company has no power to use its funds to prosecute a suit not instituted by it; and a court of equity will, at the instance of a

shareholder, restrain it from doing so, without going into the question whether the suit is or is not for the benefit of the company.—*Kernaghan v. Williams*, Law Rep. 6 Eq. 228.

See RAILWAY, 2.

VENDOR AND PURCHASER OF REAL ESTATE—See FRAUDS, STATUTE OF, 2.

## VESTED INTEREST.

A gift to all the children of A, "now or here after to be born, who shall attain twenty one," was followed by a power of advancement out of the "vested or presumptive share" of any object of the gift. *Held*, that the class of children to take was not ascertained when the eldest attained twenty-one (*Bateman v. Gray*, 29 Beav. 447, reversed).—*Bateman v. Gray*, Law Rep. 6 Eq. 215.

## WAY.

1. The mere non-user of a way for thirty years does not, in the absence of the acquisition of rights by other parties in consequence of it, amount to an abandonment.—*Cook v. Mayor, &c., of Bath*, Law Rep. 6 Eq. 177.

2. If a plaintiff has suffered a particular injury from the obstruction of a public way, a bill for an injunction will lie, and the attorney-general need not be made a party.—*Ibid*.

WILL—See DEVISE; HEIRLOOM; LEGACY DUTY; NEXT OF KIN; POWER, 2; REVOCATION OF WILL; TRUST; VESTED INTEREST.

## REVIEWS.

THE LAW MAGAZINE AND LAW REVIEW: February, 1869, London: Butterworth.

We draw largely from the masterly pages of this welcome quarterly. The last number contains articles on the following subjects:—Jettison and General Average—Considerations on the facilitating proceedings in Criminal matters—Lord Kingsdown, formerly known as Mr. Pemberton Leigh, who is spoken of as a lawyer of much ability, but whose name, he being a mere lawyer, though successful and upright, will be scarcely known to posterity—Post nuptial Settlements—The High Sheriff, which we copy—London Criminal Law and Procedure and Church Patronage, neither of which will interest us much here—Lord Cranworth—Amalgamation of the Professions—Recent decisions on the Equitable doctrine of notice, transcribed for the benefit of our readers—&c.

## REVIEWS—ITEMS.

THE AMERICAN LAW REVIEW: Boston: Little, Brown & Co. January, 1869.

This comes naturally in order after the quarterly it would seem to take partly as a model. It commences with an excellent article on the confinement of the insane, then follow other articles of much interest to its readers south of us. It contains the usual excellent digests of cases, English and American, that we have so often alluded to.

## BOOKS RECEIVED.

We also acknowledge the regular receipt of THE SOLICITORS' JOURNAL and WEEKLY REPORTER; THE LAW TIMES, with Reports; THE AMERICAN LAW REGISTER; BLACKWOOD and the English Quarterlies; LOWER CANADA JURIST; LEGAL INTELLIGENCER, Philadelphia; LEGAL JOURNAL, Pittsburg; CHICAGO LEGAL NEWS; GODEY'S LADIES BOOK, &c.

**LAWYERS AND CLIENTS.**—There can be no justice in a community without the constant intervention of a trained and educated body of men, whose interest and business is to see that justice is done. No thanks to them for it. They are paid for their labor, as they ought to be; for every one who works, and he only, shall be paid. But their work is laborious and difficult, affording scope for the exercise of the highest morals and intellectual qualities, and requires a special education and ample learning, and shall be paid accordingly. And, in the main, it is well done, for the profession does not admit of quackery. It is a saying among lawyers, that "a man who is his own lawyer has a fool for a client;" but there are very few fools of this description in the world. Sometimes a man who is not a lawyer ventures to write his own will; and when he does, unless the provisions are very few and simple, he generally makes a nice piece of work for the lawyer, and a very bad one for his devisees. But I never knew one bold enough to examine for himself a title to real estate which he wanted to buy, and remember only one who was rash enough to try his own case in court. I have known many people who would listen to any quack in medicine, and swallow almost any prescription, but never one who, when he found himself involved in a legal difficulty, did not desire the advice of a legal practitioner, and the best, too, whose services he could command. A man who is positive and dogmatical with his physician or his clergyman, is apt to be submissive to his lawyer, for the reason that when he meddles with the law, he knows that he is trifling with edged tools, which may cut deep when he least expects it. "What are you going to do next?" said a client to an astute old lawyer in a neighboring city. "I am going," said the lawyer. "to file a demurrer." "A demurrer, and what is that?" "A demurrer is what your Maker never intended that you should understand!"—*Geo. Wm. Brown.*

For his mastery of oratorical artifice Alexander Wedderburn was greatly indebted to Sheridan, the lecturer on elocution, and Macklin, the actor, from both of whom he took lessons; and when he had dismissed his teachers and become a leader of the English bar he adhered to their rules, and daily practised before a looking-glass the facial tricks by which Macklin taught him to simulate surprise or anger, indignation or triumph. Erskine was a perfect master of dramatic effect, and much of his richly-deserved success was due to the theatrical artifices with which he played upon the passions of juries. At the conclusion of a long oration he was accustomed to feign utter physical prostration, so that the twelve gentlemen in the box, in their sympathy for his sufferings and the admiration for his devotion to the interests of his client, might be impelled by generous emotion to return a favorable verdict. Thus when he defended Hardy, hoarseness and fatigue so overpowered him towards the close of his speech, that during the last ten minutes he could not speak above a whisper, and in order that his whispers might be audible to the jury, the exhausted advocate advanced two steps nearer to their box, and then extended his pale face to their eager eyes. The effect of the artifice on the excited jury is said to have been great and enduring, although they were speedily enlightened as to the real nature of his apparent distress. No sooner had the advocate received the first plaudits of his theatre on the determination of his harangue, than the multitude outside the court, taking up the acclamations which were heard within the building, expressed their feelings with such deafening clamor, and with so many signs of riotous intention, that Erskine was entreated to leave the court and soothe the passions of the mob with a few words of exhortation. In compliance with this suggestion he left the court, and forthwith addressed the dense outdoor assembly in clear, ringing tones that were audible in Ludgate Hill, at one end of the Old Bailey, and to the billowy sea of human heads that surged round St. Sepulchre's Church at the other extremity of the dismal thoroughfare.—*Jefferson.*

**THE SALARY OF JUDGES.**—A Bill has been introduced in the Legislature to fix the salary of Supreme Judges at \$4,000, and the Circuit Judges at \$3,000. This is a measure much needed, and should pass at once. Let us give our Judges a fair compensation for the labor exacted of them, and for the legal learning and ability asked of them. We expect our Judges to perform an immense amount of labor, and then pay them only a beggarly salary. A lawyer of ability whose services are valuable, can not afford to take the judgeship at the present salary. Give them good pay, then require them to do the work or resign.—*Chillicothe Spectator.*

HORACE GREELEY purposes to write, during the year 1869, an elementary work on Political Economy, wherein the policy of Protection to Home Industry will be explained and vindicated. This work will first be given to the public through successive issues of THE NEW YORK TRIBUNE, and will appear in all its editions—Daily, \$10; Semi-Weekly, \$4; Weekly, \$2 per annum.

## THE ACT AS TO SHORT FORMS OF CONVEYANCES.

## DIARY FOR APRIL.

1. Thur. Local School Supt. term of office begins.
4. SUN. 1st Sunday after Easter.
5. Mon. County Court of York Term begins.
7. Wed. Local Treasurer to return arrears of taxes due to County Treasurer.
10. Sat. County Court of York Term ends.
11. SUN. 2nd Sunday after Easter.
18. SUN. 3rd Sunday after Easter.
23. Fri. St. George.
25. SUN. 4th Sunday after Easter. St. Mark.
30. Fri. Last day for non-residents to give list of lands or apportionments from assessment. Last day for Local Clerks to return occupied lands to County Treasurer.

THE

## Canada Law Journal.

APRIL, 1869.

## THE ACT AS TO SHORT FORMS OF CONVEYANCES.

This Act is taken from the Imperial Act 8 & 9 Vic. ch. 119, and its object is to relieve from the labor of inserting covenants at length, and all the estate clauses, &c., and give to a conveyance drawn under it, using the short forms, the same efficacy and effect as would have been given to it if drawn irrespective of the Act, with the use of the corresponding lengthy forms. A recent case, *Cameron v. Gunn*, 25 U. C. Q. B. 77, however, would seem to indicate that, under certain circumstance, a conveyance may be aided in its effect if expressed to be drawn "in pursuance of the Act to facilitate the conveyance of real property." In one case, *Nicholson v. Dillabough*, 21 U. C. Q. B. 595, an indenture dated in 1852\* expressed to be drawn in pursuance of the Act to facilitate, &c., for a consideration of £75, with a limited covenant for possession and further assurance, was held sufficient to pass the fee, though the only operative words were *quit claim* and *release*, and the releasee had neither possession nor estate whereon a release could operate. McLean, C. J., and Burns, J., particularly referred to the fact that the deed was expressed to be in pursuance of the Act to facilitate the conveyance of real property, and that it contained covenants for possession and further assurance.

\* The date given to the indenture in the report is a misprint; the date there given is 1842, but the Act was not passed till 9 Vic. The prior part of the report gives the correct date.

In the case of *Cameron v. Gunn*, *supra*, the defendants, by deed, dated in 1865, *remised, released, and forever quitted claim* to the plaintiff for a consideration of 5s., and without covenants. The Court referred to the fact that the former case was expressed to be in pursuance of the Act, that it was for £75, and contained a covenant that the purchaser might enter and take possession, all which they said was wanting in the case before them, and the instrument was held inoperative as either a release, grant or bargain or sale. Considering that the Court merely distinguished the cases on the grounds above mentioned: considering also that to the validity of a bargain and sale, a consideration of 5s. is as sufficient as a consideration of £75, and that to the validity of a deed as a grant, no consideration is requisite (at least when expressed to be to the use of the grantor, so as to prevent the use resulting to the grantor), it would seem that the Court, in denying efficacy to the deed, must (if they recognized the former case as law) have relied on the fact that it was not expressed to be in pursuance of the Act to facilitate the conveyance of real property, and contained also no covenants for possession or further assurance, and probably chiefly on the latter grounds: (see the observations of Draper, C.J., and Morrison J., in *Acre v. Livingstone*, 26 U. C. Q. B. pp. 285, 288, 296, but see per Hagarty, J., 292.)

It should be remembered that there is no longer an Act entitled "an Act to facilitate the conveyance of real property;" the original Act of 9 Vic. so entitled having been consolidated, and entitled "An Act respecting short forms of conveyances"; a corresponding change was omitted, however, in the first schedule.

On the whole, it is submitted that at present a mere reference to this Act will not give a conveyance any greater efficacy than otherwise it would have, except as pointed out in the Act.

There is a singular mistake in this Act, in that the only operative word made use of is the word "grant," whereas lands, that is the immediate freehold, did not at the time of the passing of the Act lie in grant, nor was it till some time afterwards that lands acquired that capacity (14 & 15 Vic. c. 7, s. 2; Con. Stat. U. C. c. 90, s. 2; see however the effect of 12 Vic. c. 71, s. 2, repealed by 14 & 15 Vic. c. 7). The error arose from copying the English Act without attention to the fact at the time of the pass-



## THE ACT AS TO SHORT FORMS OF CONVEYANCES.

ing the Act in England, lands there did lie in grant. The error is important, because in some cases a conveyance may be found to fail entirely, and in other cases only to operate by the raising of a use when it was not intended, and thus causing the uses expressly declared, to be but uses on a use, and therefore trusts. Whatever doubt there may be as to whether words of release only may operate as a grant or bargain or sale, (see *Cameron v. Gunn*, and *Nicholson v. Dillabough*, *supra*, in the text and notes,) there can be no doubt that a deed using only "grant" as an operative word, may take effect as a bargain and sale, if on a pecuniary consideration, or as a covenant to stand seised if on a consideration of blood or marriage, or as a release if there be possession or a vested estate whereon it can operate, or as an assignment, surrender, and in other modes. The nugatory grant therefore might be valid as a bargain and sale, or covenant to stand seised, but in such cases, if uses were declared, it would be attended with the results above alluded to, of misplacing them and also the legal estate, by the use being raised, unintentionally, yet necessarily, in the bargainor or covenantor. Thus, if A, in anticipation of marriage, had by way of settlement, *granted* to B and his heirs, to the use of him, A, and his heirs till marriage, and thereafter to other uses declared, the instrument would have been void as a grant; and though if a pecuniary consideration had been expressed, it might have operated as a bargain and sale, then the fee would have been in B in trust for A, and not in A, as intended; and if the marriage had happened, the uses declared, which it was intended should confer legal estates, as being executed in possession by the Statute of Uses, would have been mere trusts. So also, if A had granted to B, in fee, to the use of him, A, and another, in fee, with a view to vest the estate in himself and such other jointly, (a case very likely to have occurred on appointment of a new trustee), the deed was either inoperative, or if it could have operated as a bargain and sale, the legal estate would have been in B. In the above and the like cases the intention was that the instrument should operate as a conveyance at Common Law, and that the first use raised should be in the grantee to uses, and this would be so, and the instrument would so operate now that lands lie in grant; but if it can only be supported as a bargain and sale, or covenant to

stand seised, the first use raised is of course in the bargainor or covenantor.

If the instrument could be supported as a Common Law conveyance by way of release, it would work as intended, but this presupposes possession, or some vested estate, at least, in the releasee. Possibly the Act of 12 Vic. ch. 71. sec. 2 (repealed) might aid the want of possession, or of estate, in cases of grants after that Act; the construction of that section is, however, very obscure.

Great caution appears requisite in the use of this Act, as the forms in its schedules are, in strictness, appropriate only to the most simple conveyances. The form in the first schedule is that of a grant in fee simple, and the covenants in the second section are framed with reference to an assurance of that simple description; and it may be useful to impress upon parties who choose to avail themselves of the Act, that more than usual care will be necessary to have their deeds accurately engrossed. The Act gives a particular efficacy to a particular form of words, and the slightest deviation from that form will endanger the operation of the Statute with reference to the covenant in which the mistake occurs; and such covenant may then, under the second section, be left to the very doubtful effect it may have by its own independent operation.

Section 3 of schedule 2 authorizes the introduction of exceptions and qualifications of the covenants, but for the reasons above given it is dangerous to interfere with the forms, unless in very clear cases, for it may not be easy to determine what is the introduction of an exception or qualification. Thus the superadding to the covenant for right to convey free from incumbrance the words "except a certain mortgage dated, &c.," would clearly be within the authority; but in the very common case of *striking out* the words "notwithstanding any act of the said covenantor" with a view to render the covenant for right to convey, and all *subsequent* covenants *unqualified*, it is by no means clear that that is an *introduction* of an exception or qualification; it is rather the omission of that which is intended to enlarge the covenant and deprive it of its exceptional and qualified character, and render it according to the common expression "full and unlimited." If the forms of covenants in the Act did not, as in effect they do, except the acts of all other than the covenantor, and

## THE ACT AS TO SHORT FORMS OF CONVEYANCES.

were not confined only, as they are, to his acts, &c., and the words "notwithstanding any act of the covenantor" had accordingly been omitted in the Act, then the *insertion* of those words by the conveyancer would have been the introduction of an exception and qualification within the Act; and if this be so, the *omission* of those words cannot be the same thing, and be also an introduction of a qualification. Even though the omission of the words should be within the Act as regards the first covenant, it by no means follows that the effect of such omission would extend to the following covenants, and if not they would remain qualified (*Trenchard v. Hoskins*, Winch. 91, 1 Sid. 328; *Browning v. Wright*, 2 B. & P. 18.) The common practice in the profession is to strike out the words "notwithstanding, &c." under the belief that thereby all the covenants are to be read as in the second column, but unqualified, and without any acts or defaults of any one being excepted. If, however, the above remarks are entitled to any weight, it might be prudent in such cases to give the covenants at full length.

The forms of covenants adopted have received the sanction of the use of centuries, and as their effect is well understood, and they have been illustrated by many cases, it is very unwise to vary from them without necessity. It has been said, however, that in some respects the forms are not sufficiently extensive, and that they should extend to matters to which the covenantor may have been *party or privy*, for that these words are not included within the words "permitted or suffered Sug. Vend. 13 ed. 490.) Therefore where a mere trustee to bar dower (the purchaser taking the fee, subject to his interpose estate, joined with the purchaser in making a mortgage, having previously concurred with him in another conveyance, (*Hobson v. Middleton*, 6 Bar. and Cres. 295;) it was of course held that the latter conveyance was a breach of his covenant that he had done no act to encumber the estate, and the Court would not look to the value of his estate or the trust engrafted on it; but it was held that he was not responsible for the concurrence of the purchaser in the same deed, although he covenanted that he had not permitted or suffered any act whereby any incumbrance was created. The common words that he had been "*party or privy*," &c., would have given a remedy under the covenant, for of

course he was party, and therefore privy to the conveyance, although the purchaser might have conveyed without him. So again the covenants only extend to acts, &c., knowingly or willfully suffered or permitted to the contrary, and not to all defaults of the covenantor, and the distinction is very material: (Sug. Vend., 13 ed. 490.)

It is not prudent to omit a covenant, as for instance, the covenant for quiet possession or further assurance, under the impression that the covenant for right to convey free from all incumbrances will afford in all cases an adequate remedy. Thus, larger damages may be recovered under the covenant for quiet enjoyment than under that for right to convey: (*Hodgins v. Hodgins*, 13 U. C. C. P. 146 Richards, J., diss.) under the latter, unless in cases of actual or constructive frauds by the covenantor, defects in title through his default, or the right of some one claiming under him, and the like, no greater damages can be recovered, as a general rule, than the purchase money and interest. So, on the other hand, the remedies on the covenant for right to convey are not always supplied by the covenant for quiet possession, as under the latter no cause of action arises till disturbance. Under the covenant for right to convey only nominal damages are recoverable, unless there be proof of actual damage or eviction: (*Bannan v. Frank*, 14, U. C. C. P. 295; *Snider v. Snider*, 13 U. C. C. P. 158; *Grahame v. Baker*, 10 U. C. C. P. 427.) A. L.

The illness of Mr. Justice John Wilson has assumed such an alarming character that his life is despaired of. He succeeded notwithstanding his illness in finishing the Goderich Assizes; but could do no more, and went to London to rest. Judges Hughes of St. Thomas took the Assizes for him at Chatham, and Judge Duggan of Toronto was sent to fill his place at Sandwich. It was at first hoped that perfect rest and change of air might restore his failing health, but his physicians now fear the worst. The sympathies of his many friends in the profession and out of it are with him in his sufferings.

## MODERN TEXT-BOOKS.

## SELECTIONS.

## MODERN TEXT-BOOKS.

We have more than once had occasion to deplore the increase amongst us of what are called "Text-Books of the Law" upon particular subjects. They are for the most part the productions of young men, neither professedly versed in the law, nor seasoned by practice. Indeed, it is because they are in quest of practice, and in the hope of obtaining it, that most of them, ill-advised there can be no doubt, go on rushing into print, until they are satisfied, by the result, of the folly of the experiment. With this large and, unhappily, increasing number of pretenders we have done for the time. We propose, however, to say a few words upon modern text-books of a higher order, the true use to be made of them, and the abuse of them which is made.

A text-book upon any branch of law is but a methodised digest of the law applicable thereto; a sort of *catalogue raisonnée* of cases, dicta, decisions, and enactments; concisely arranged, so as to instruct the learned reader who desires to go to the fountain-head, where the sources lie; and, withal, full and clear enough to be understood by the merest practitioner, and, in that regard, to merit at least the qualified commendation which Mr. Carlyle once bestowed upon M. Thiers' "History of the Revolution," "That if you know nothing about it, it can tell you a good deal. We think that no text-book now in use amongst us, not even the very best of them, ought to be used for higher purposes than those very useful purposes to which we have enumerated. At all events we are quite sure that to treat them as having of themselves any authority, to consider them as the representatives of their originals, or to hold that the study of the old learning is in any way superseded by, or may in any degree be dispensed with in favour of the new compendium is a most pernicious mistake, and the more deplorable because of its growing prevalence. In that growth we cannot help seeing one of the actual symptoms of the decline of legal science.

It is no unfamiliar thing to hear a counsel, now-a-days, reciting to the court whole passages from the treatise of living writers, and these, it may be, writers highly respectable in their way, but certainly not arrived at the heights of the science, nor yet enjoying the prestige of the ermine. The laxity with which this lazy habit of the Bar is indulged by the Bench, is more noticeable in Courts of Equity than in those of Common Law; and we have heard it suggested that the reason is to be found in the hurry and fatigue, which the struggle to keep down the threatening mass of business under the Winding-up Acts has introduced into the bosom of those sometime slumbering establishments. This excuse, so far as it relates to the putting of "Lindley on Partnerships," for instance, upon the same

footing with the cases which he cites in his foot notes, is unsatisfactory enough. Yet let the Bar of the Superior Courts have the benefit of it, so far as it goes. The mischief, however, is far more widely spread. There are now local courts and local bars in all the counties and great towns of England and Wales, not to speak of our transmarine empire. There are County Courts, Recorders' and Quarter Sessions' Courts, Magistrates' Courts, and Revision Courts;—(for as yet we have had no experience of the new Courts for Trial of Election Petitions), and, last but not least, there are the Parliamentary Committees, *quasi* courts of much influence and having their own bars. In each and all of them the bad habits which we reprehend is more or less prevalent. In each and all of them the fatal reaction of that habit upon itself is making itself felt. In each and all of them there is a want of tone in the system. The ring of the metal is getting less and less clear. If the habit lasts much longer, we shall hear of its being drawn into a precedent:—and when once that is so, the day of learned lawyers will be nearly done.

There remains an objection, still more serious, to be stated to this abuse—it is full of danger to the interests of the suitor. There is no safety in an indolent reliance of that kind. There is not one text-book known to lawyers which is beyond or above criticism, in respect of the accuracy of its analysis, or the completeness of its synthesis. The works neither of Lord St. Leonards, Lord Tenterden, nor Mr. Justice Williams, in this century, neither of Chief Baron Gilbert, nor Sir William Blackstone in the eighteenth century, nor yet of Lord Hale himself in the seventeenth, much less those of his learned but too servid predecessor in the same century, Sir Edward Coke, can be pronounced to be entirely without errors, whether of omission or of commission; and on the contrary, those of Coke and Blackstone are particularly obnoxious to criticism on either ground. Yet amongst them all there is not one name to which the imputation of *cacoethes scribendi* is attached, or with which the fame of learning or exemplary labour is not associated to a degree which, in a mere book-making time like the year 1868, must seem prodigious. But if such as these must still be held unequal to the character of oracular infallibility, how can it be said that the men of the second rank are fitted to assume it? If we are to receive nothing upon trust, though it be from the noble and learned commentator of the Laws of Vendors and Purchasers, it surely must be very unsafe as well as unreasonable for any man, student, counsel, or attorney, to pin his simple faith to any work on the law of contracts, although it be that "standard work," as the provincial or practical mind esteems it, the treatise of Mr. Addison himself.

That it is not only unsafe, but dangerous in the highest degree, we think needs no proof.

## MODERN TEXT-BOOKS.

Those who require it, however, we also think, can easily furnish themselves with the most convincing proof, by taking at random any single page, for instance, of Mr. Addison, and testing with the help of the Reports the value of his citations. But we are minded even to spare them even that labour. We have at hand two works (of the second rank, perhaps, but yet of the highest grade in that rank), both published within the last year, one of them indeed late in the summer of this year. Of both we have had occasion to express—what we felt and feel—the greatest admiration. They are, and in all probability must remain, not in name merely, but in fact, the standard works upon their respective subjects,—“The Law and Practice of Injunctions in Equity;” and “The Law of Mortgages and Securities upon Property.” If then it be made clear to their readers that not even Mr. Williamson Kerr, nor yet Mr. William Richard Fisher, may be implicitly relied on, and that, on the contrary, it is absolutely necessary to probe and examine into the accuracy of either, before adopting his opinion, or acting according to his advice, in order to be quite safe, they will be the first to acknowledge that we have chosen two very striking illustrations of the perils which environ them.

Let us commence with Mr. Kerr, the earliest in order of publication; and first let us open his pages on “Titles to Light,” under the Prescription Act.

The reader of the treatise is *not* informed of the statutory abrogation of all customs to the contrary; and he is informed that, “after an obstruction has lasted for a year,” without proceedings being taken, “the custom of London or other local custom will prevail” (p. 357); a most erroneous method of stating what must have been Mr. Kerr’s meaning—viz., that the obstruction in the case supposed will have the effect given to it by that statute.

With respect to “patents,” we find it said that (p. 423) “until entry of registration the original patentee is to be deemed and taken to be the sole and exclusive proprietor of the patent;” and (Ibid) “the registration of a patent will complete an inchoate title;” and for these manifestly erroneous propositions, the 15 & 16 Vict., c. 83, s. 35, is cited. Turning to that section, however, we find that the “registration” there spoken of is that of “assignments of patents;” which is quite another thing. With even greater inaccuracy it is denied, on the supposed authority of the cited cases, that (p. 408) “the plaintiff has any right to the discovery of particulars on which the plaintiffs relies, as shewing a user of the thing patented prior to the date of the patent;” the true point decided being that he has no right to such discovery as to the like particulars when relied on by the *defendant*.

A still stronger contrariety between the learned author’s note of the point of decision, and the decision itself, occurs at p. 643, where Lord Romilly, M.R., is made to hold that “an

injunction restraining a defendant, his servants, and agents, does extend to his tenants;” his lordship having expressly holden the very contrary—viz., that it does not extend to the tenants, and will not be enlarged so as to extend to them.

The authority of 1 Railw., C. 616, is cited for the startling position that (p. 632) “the question, whether there has been a misrepresentation or concealment of material facts upon the application for an *ex parte* injunction, *cannot* be taken into consideration, *on appeal from an order* made by the court in which the injunction was granted, or by which it was continued.” The marginal note—as usual, a very inaccurate one—does certainly favour that erroneous reading of the judgment. But the report shews the true reading to be simply this:—That, to entitle the party objecting to an order to dissolve on that ground, he must lose no time after discovering the fact in moving the court below, and if he neglects to do so (*e.g.* as in the principal case, during the whole of the long vacation), neither that court, nor, on appeal, the court above, will entertain his application.

A student—if he be led to believe (what he is told at p. 498) that “*it is not necessary*, in order to render such evidence (*i.e.*, parol evidence of particular meaning of phraseology) admissible, that there should be any ambiguity on the face of the instrument, which has to be construed,”—will certainly be very much misled. And if, notwithstanding, he should hold to the familiar distinction of *ambiguitas patens* and *ambiguitas latens*, it will probably be that, to borrow the words of an epilogue of Lord Coke, he has “at some other time, and in some other place,” found the requisite instruction. We do not for a moment suppose—and far less wish others to suppose—that Mr. Kerr really intended to lay down the proposition in question. All that we mean to say of this instance of inaccuracy, and of those which have gone before, as also others which we had selected, but to which we must for brevity’s sake be contented to refer in a footnote,\*—that there is a great want of precision in the language of the abstract, and that, here and there, it is too evident that the toil of compilation has given place to the easier labour of transcription.

It is always toward the end, or at least the middle, of a great work like Mr. Kerr’s otherwise valuable treatise, that these blemishes first appear or become frequent. We cannot help thinking that the real secret is there. It is in the literal meaning of the hackneyed phrase to “the hurry of composition” that

\* The following cases appear to have been more or less misunderstood—viz., *Coutts v. Gorham*, *Needham v. O’Leary*, *Sweet v. Benning*, *Reade v. Conquest*, *Reade v. Lacy*, *Pollard v. Clayton*, and *Grand Junction Canal Co. v. Dimas*, at pp. 355, 437, 454, 464, 526, and 641 of Mr. Kerr’s. Of points imperfectly stated, the cases of *Wynne v. Griffith*, at p. 557, of *v. The Attorney-General v. G. N. R. Co.*, and *Hare v. L. & N. W. R. Co.*, at p. 543, of *Beeching v. Lloyd*, with its sister cases at p. 551, and of *Thornhill v. Thornhill*, at p. 640, may serve as examples.

## MODERN TEXT-BOOKS.

the fault is mainly due. The printer wants "copy;" the publisher is importunate; the author is busied about many things; but the publication cannot now be deferred any longer—a constellation of chances full of ill omen for the credit and usefulness of the coming book.

Let us next turn to Mr. Fisher's treatise. It is certainly a work of even higher reputation than that of Mr. Kerr, whether we regard the length of time during which it has been received as the best text book upon the law of mortgages, or the fact of its having recently attained the honours of a second edition. It is nevertheless open to much the same animadversions. Let us not be misunderstood. With all the deductions which we are going to make from the commendation of which we have never been niggards towards Mr. Fisher's very laborious, learned, and useful treatise, we still see no reason to retract those commendation or reduce their measure. And it is precisely because his book deserves so thoroughly the character it has won, of being the only good and complete repertory we have of "The Law of Mortgages and other Securities upon Property," that we select it to illustrate our present censures, in preference to scores of others much more obnoxious to them, and to which those censures must, therefore *à fortiori*, be considered to attach. For if our sciolists are made to discover that not even the standard law books are implicitly to be relied on, their faith in the common run of compilers cannot fail to wax cold:—

"And this ensample added yet thirto,  
That if gold ruste, what should iron do?"

With respect to the following selections from Mr. Fisher's book, we need scarcely explain that our references are to the edition of the present year.

Upon the important question of the nature of the possession which supports possessory lien, one doctrine is laid down (p. 158) which certainly is in open contradiction to the law; viz., that *the mere possession of goods by a factor or other agent will confer no lien, if by the terms of the contract, by his own permission, or by legal construction, they evidently remain under the dominion of the principal;*"—and *Haggard v. Mackenzie*, 25 Beav. 493, is cited in support. On referring to that case, however, Lord Romilly, M.R., will be found to have emitted no such view subversive of the whole of the law of lien. On the contrary, what he decided was, that even a servant entrusted with goods in a place under his master's control may, before the bankruptcy of the latter, acquire a lien upon them by simply removing them to another place, not being under his master's control;—but that, until then, his master continues to have them, through him, in his order and disposition; although he calls the servant his factor or agent.

In treating of notices of sale by mortgages under their powers of sale, the point decided by Vice-Chancellor Stuart, in *Ford v. Healy*

(or *Heely*), 3 Jurist, N. S., 1116, and 5 W. R., 517, is stated to be that (p. 508) "the express notice clause (in the mortgagee's power of sale) would not help the purchaser unless the contract were valid:" on which the author proceeds to remark, that "as this was the question for decision, it does not appear how the clause could be made useful." Now it is very obvious that the Vice-Chancellor did give effect to "the express notice clause" in that case; for he directed the usual references as to title. And we find, on looking into his last edition of Vendors and Purchasers, that Lord St. Leonards, with his usual accuracy, has stated it thus, c. 1, s. 5, pl. 88, p. 68;—"It was held that the mortgagee himself could make a good title; yet he was clearly liable to the creditors (viz., under a trust deed executed by his mortgagor after default) for selling contrary to his power. The contract itself shewed that the proper notice could not have been given; yet equity at his suit enforced the contract."

Of the power of sale in general, Mr. Fisher says (p. 505): "The power may be extended, by reference to property not specifically included in it;"—a position which may, or may not, be approved by the court, but which certainly, was not laid down in the solitary case of *Ashworth v. Mounsey*, 9 Exch. 175, which he cites to support it. There the only question being whether the purchaser was entitled to recover his deposit, and the sufficiency of the vendor's power of sale coming incidentally under consideration, it was held, upon the peculiar wording of the power, that it was intended to apply *à priori* not only to the part of the estate then charged, but also the rest of the estate, which it was also then agreed to charge by an equitable mortgage thereafter to be made, and which afterwards was made. And it was also held that, even if that were not so, the purchaser could not recover his deposit; the true nature of his vendor's interest having been correctly described in the conditions of sale.

Of the pawnbroker's power of sale in particular, it is said, on the authority of the 39 and 40 Geo. III., c. 99, that after sale, "the overplus on the price is to be paid to the pawnee or his representative." It may be that "pawnee" is an error of the press for "pawnor." But, in that case, it would have to be explained why the condition is omitted that the claim be made within three years, as also the penalties of fine and forfeiture by which performance is enforced.

A mortgagee in possession, it is said (p. 886), "is not obliged to defend the possession of property which the exercise of a strict legal right has thrown into his hands." The proposition is too wide, and as lawyers would say, "bad for the excess." Confined within the limits which the two authorities cited by Mr. Fisher (*Perry v. Walker*, 1 Jur. N. S. 748, and *Cocks v. Grey*, 1 Giff. 77) impose, viz.: that the mortgagee in possession is not bound to defend it "against lawful owners,"

## SERJEANTS' INN AND ITS PORTRAITS.

and especially where the law is not clear, the proposition is reasonable and right.

The point decided in "The Change," Swabey's Adm. R. 240 (quoted by the author from 29 L. T. 147), has been likewise misunderstood—at least, we cannot find in either report any trace of the refusal of evidence of which Mr. Fisher makes mention (p. 933), viz: "of the rate of interest agreed to be taken on a bottomry bond." It is unlikely, indeed, that the court had refused to take such evidence, if the silence of the instrument itself had been the only difficulty.\* But, in truth, the question was not raised, and all that Dr. Lushington there determined, was to refuse a motion for leave to alter the bond, by filling up the blanks which had been left for the insertion of those rates; the only evidence upon which the motion was founded, being an exhibit purporting to be sworn at Calcutta, and to be the notarial certificate or affidavit of a practitioner there, by whom it had been draughted, and which stated that the agreed rates had been omitted by him in mistake.

At p. 968, the case of *Green v. Briggs*, 6 Hare, 632, is thus stated:—"Where the bankrupt devisee of an equity of redemption disclaimed, and the bankrupt was joined, he had no costs from the mortgagee; for, it seems, by the disclaimer, the assignee's interest became re-vested in the bankrupt." It is a mass of error. The assignees disclaimed; and therefore the bankrupt, in whom the equity was thereby re-vested, was joined, but had no costs from the mortgagees.

A still greater puzzle has been, naturally enough, occasioned at p. 1035 by the substitution of "receive" for "pay." As it stands, the reader learns from the *placitum* in question (1874), that "if the person entitled attends (at the time and place of payment) by his agent, the agent ought to be authorised by a power of attorney to receive the money; and, for want of such authority, the court has refused to make the order absolute, although no person appeared to receive the money (*Whitehead v. Lyull*, 2 Jur., N. S. 671;) 3 Sm. & G. 314."

There is, at p. 624, a similar blunder ("to" for "by"), which combined with a singular want of precision in the wording of the whole sentence, will certainly justify mankind in using Mr. Fisher's name for these two pernicious heresies: (1.) Purchase-money is payable by, not to, the vendor; and (2.) Where the title is deduced by recital from him, a subsequent purchaser will not be affected with notice of non payment. It is only by dint of much dislocation and transposition of the verbiage that we arrive at the real meaning of the cases cited in the foot-note to that passage, which is this:—"A subsequent purchaser will not be affected with notice of non-payment of the purchase money to the original vendor, merely because the title is deduced by recital from him; for the recital does not show the non-payment.

\* See *Dickenson v. Heron*, V. & P. (14th edn.) p. 643, and other cases there cited.

We had marked a number of almost parallel passages to those above presented, but the laws of space are inexorable when the conduct of a quarterly is question. We must therefore content ourselves with a simple reference to each, by *placitum* and by page.\* Let us also say, that we do so quite as much in the hope of attracting the attention of the learned author to the blemishes upon his otherwise admirable work, of which these are so many specimens, as because they serve the purpose for which we noted them—that of illustrating and justifying what we have said concerning the perils of reliance upon text-books.—*Law Review*.

## SERJEANTS' INN AND ITS PORTRAITS.

The superb re-decoration of the Hall of Serjeants' Inn, in Chancery Lane, and the cataloguing of its portraits, call public attention just now to that ancient and time-honored edifice. Mr. Serjeant Bain, the treasurer of the Inn, deserves great credit for his management of the re-embellishment, and for his publication of the Catalogue of Portraits. Before entering into details, we had better give a general account of Serjeants' Inn itself, and we cannot do that better than by extracting what Mr. Timbs has so ably written on the subject, in his recent popular work, entitled "Curiosities of London,"—

"There were," says Mr. Timbs, "originally three inns provided for the reception of the judges, and such as had attained to the dignity of the coif, viz., first, Scroop's Inn or Serjeants' Place, opposite St. Andrew's Church, Holborn, now long deserted by the Serjeants; secondly Serjeants' Inn, Fleet Street, which was held by lease under the dean and chapter of York, and is now deserted as an inn for serjeants; and thirdly, Serjeants' Inn, Chancery Lane, the only place that can with propriety be at present called serjeants' Inn. Scroop's Inn belonged to John, Lord Scroop, and was afterwards known as Scroop's Court. After his death, it was let out to some serjeants, who adopted it as their place, whence it was called Serjeants' Inn, in Holborn. After they disused it, the site was let for tenements and gardens. The serjeants about the beginning of the reign of Henry VI., and not before, resorted to the Fleet Street Inn, which had a very fine chapel and hall, and a stately court of tall brick buildings. It likewise retained a steward, a master cook, a chief butler, with other attendants and servants, and a porter. The old inn in Holborn having been sold, and the Fleet Street Inn having become dilapidated, the serjeants were quite ready to entirely emigrate to Chancery Lane, the third and chief inn to which one need invite attention. It bore once the name of 'Faryndon Inn,' and it

\* Pl. 339, *ad calc*; (p. 202) 475, *ad calc*; (p. 289) 1122, *ad calc*; (p. 610) 1143; (pp. 621-22) 1205, *ad calc*; (p. 654) 1377; (p. 768) 1381; (p. 770) 1443; (p. 799) 1453, *ad calc*; (p. 803) 1455, note (s.); (p. 805) 1489; (p. 824) 1640; (p. 904).

## SERJEANTS' INN AND ITS PORTRAITS.

was known as early as the 17th Richard II., when the inheritance belonged (and has done since) to the Bishop of Ely and his successors. In the 'accompt' of the Bishop's bailiff, 12 Henry IV., it was called 'Faryndon Inne,' and it was stated 'that the serjeants-at-law had lodgings there.' In 1416, 7 Henry V., the whole house was demised to the judges and others learned in the law. The freehold after having passed through various hands, came to be held for three lives by Sir Anthony Ashley, Knight, under whom the judges and serjeants continued to rent it. Eventually the serjeants negotiated with the Bishop of Ely for the purchase of the fee simple of the property and the same was ultimately vested in the society by an Act of Parliament, creating the Society of Serjeants' Inn, Chancery Lane, for the purpose, a corporation, upon the annual payment for ever of a fee farm rent to the Bishop and his successors. The officers belonging to this inn are similar to those in Fleet Street—namely, a steward, a master cook, a chief butler, and their servants, and a porter. In 1837-8 the inn was rebuilt (under the auspices of Serjeant Adams, the then treasurer) by Sir Robert Smirke, R.A., except the old dining hall of the society, which was then fitted up as a court for Exchequer Equity sittings, but is now used as the state dining room of the serjeants, including the common law judges, who are always serjeants-at-law. The handsomest room is, however, the private dining-room, which contains one of the finest collections of legal portraits in the kingdom, including those of Sir Edward Coke, by Cornelius Jansen; of Lord Mansfield, Lord King, Sir Francis Buller, Chief Justice Tindal, Lords Eldon, Denman, and Lyndhurst, all by painters of note. The windows (containing the armorial ensigns of judges and serjeants) are finely executed. The chambers where the judges of the common law sit to hear summonses and other private matters are in this inn. The arms of Serjeants' Inn are, *or*, a stork, *ppr.* This Serjeants' Inn is the exclusive property of the serjeants-at-law, or *servientes ad legem*, who are the highest degree in the common law.

"The other, but obsolete inn, in Fleet Street, already described, still bears the name of Serjeants' Inn, and this is liable to be mistaken for the now only real Serjeants' Inn in Chancery Lane. The Fleet Street Inn was destroyed in the Great Fire, was rebuilt in 1670, and again rebuilt, as we now see it, with a handsome stone fronted edifice, by Adam the architect. This inn is now let in private chambers to any one who likes to rent them."

So far Mr. Timbs; but since he has written, not only the picture-room and its contents have been thoroughly renovated, but the State-hall and other apartments have undergone complete restoration. The State-hall is now rendered suitable to the dignified company who frequent it. It has been refloored, repainted, and the old cumbersome stove has

been removed, to make place for heating by hot-water pipes. Two gas-burners from the ceiling brilliantly illuminate the room, throwing a picturesque light upon the antique carvings, armorially stained windows, and on the grim bust of Charles II., placed above the table of honour. Here the judges and serjeants may in thorough comfort dine, according to custom, on the first and last days of Term.

The first of next Term will indeed be somewhat remarkable, as at the dinner on that occasion four new serjeants will be admitted—namely, two judges, Mr. Justice Brett and Baron Cleasby, and two serjeants-at-law, Mr. Sargood and Mr. Sleigh.

Serjeant Bain has not been content with the re-embellishment of the hall internally (the exterior has been made also very handsome), but has added literary light to the institution, in the publication of a catalogue *raisonné* of all the portraits, whether pictures or prints, in the building. This catalogue, which he has brought out with the assistance of Mr. Serjeant Burke, is very comprehensive.

Beyond a record of the portraits contained in this ancient and unique hall, the resort of the various serjeants-at-law for ages past, it is not our province to offer any artistic judgment on the merits of any particular one, save those of the eminent Sir Edward Coke, Knt., by Cornelius Jansen, and Sir Francis Buller, Bart., by M. Browne, which carry with them the reputation of being the most magnificent among the whole collection. These paintings are in the best style of the artists of the day.

The catalogue does not describe how in every case the portraits of eminent judges found their way to the hall. In all probability, in the majority of instances, they were the presents of the judges themselves; but in some the Inn is indebted to the liberality and forethought of descendants, relatives, and even private individuals, for the honour done them by placing under their safe custody the only remaining resemblances of those who were once the great expounders of the law, and are now the time-honoured monuments of the study of that science, upon whose exponents all lawyers look back with reverence. The portrait of Lord Lyttleton, who was Lord Keeper in the of Charles I., was presented by a Mr. Ray, as was also that of Sir John Powell, Knt., one of the Judges of the Court of King's Bench, who presided at the trial of the seven bishops. But for the munificence of this gentleman, those noble effigies might have been lost to the world, or have decorated the walls of some obscure mansion where their historical associations might have been wholly unknown or unappreciated. At the Board of Green Cloth, November 2nd, 1847, Lord Denman is stated to have moved a resolution, thanking the Marquis Camden for the present of a portrait of his ancestor, Sir John Pratt, Knt., who was Lord Chief Justice of the King's Bench from 1717 to 1725, the year of his death. And on the 31st January, 1839, a vote of thanks was

## ST. LEONARDS ON CAMPBELL.

passed to Sir William Horne for the present of the portrait of the celebrated lawyer, Lord Mansfield, who for thirty years presided over the Court of King's Bench. Owen's picture of Lord Tenterden was presented, in 1850, by the present Lord Tenterden; and in 1839 Mr. Bayley presented the likeness of his father, Sir John Bayley, to the Inn; and in the same year Lord Lyndhurst presented the Society with the portrait, by Phillips, of himself. The Society has also a fine portrait of the late Lord Chancellor Truro, by T. Y. Gooderson, after Grant, R.A.; of this the following is a minute of the Board of Green Cloth, November 3rd, 1861:—

"Mr. Serjeant Manning, the Treasurer, stated that Lady Truro had presented a portrait of Lord Truro, which in reliance upon the gallantry of the Judges and Serjeants, Serjeant Manning had taken upon himself to suspend in the Hall. Resolved that the present be acknowledged by a deputation consisting of the Junior Judge, Mr. Serjeant Storks, and the Treasurer."

The only portrait of a modern Serjeant (not a Judge) suspended to the walls is that of Mr. Serjeant Adams, for many years Acting-Treasurer to the Society, and Chairman of the Middlesex Bench of Magistrates, and Assistant-Judge of the Sessions. This portrait was partly the substitute for a presentation of a piece of plate to the Serjeant, in consequence of his able management of the rebuilding of the Inn, and in token of his exertions for many years, in the interest of the Society. At the Board of Green Cloth, January 15th, 1839, it was resolved:—

"That the Judges and Serjeants, Members of this Society, are deeply grateful to Mr. Serjeant Adams for the ability, the judgment, and the unwearied zeal, which he has exerted in the enfranchisement of their ancient site, to which they chiefly attribute the happy results which have been finally reported to-day; and as a small memorial of their appreciation of so noble a service, they solicit his acceptance of a piece of plate of the value of 100 guineas, to which they will all contribute, which the Treasurer will procure; for which Mr. Baron Alderson will supply an appropriate inscription; and which they trust Mr. Serjeant Adams will esteem, not with reference to its unworthiness in the point of value, but to the cordiality with which it is offered him."

But at a subsequent meeting of the Board it was resolved to request, in its place, the Serjeant to sit for his portrait, to be placed in the hall, the additional expense beyond 100 guineas to be defrayed out of the funds of the Society.

We believe that the last portrait presented to the Society is that of Sir William Erie.

In addition to the oil paintings which decorate the walls of the hall, there are three or four water-colour drawings and a large collection of very valuable and scarce prints in

frames, executed by the leading artists of the day, most of which have been copied and engraved from coloured portraits. There are also a large number collected together in a portfolio, only remaining there for want of space to exhibit.

The catalogue gives the whole in numerical order, and no small pains have been taken to make it in every way complete; great attention having been paid to the correctness of the dates of births, appointments, and deaths.

In fine, this attention paid to the structure of Serjeants' Inn and to its history, speaks well for the prosperity and permanence of this most ancient and honourable Society, whose well-being is of moment to all members of the legal profession. The serjeants-at-law are, be it remembered, independent of the Crown, and have been at all times the staunch upholders and defenders of the law, the constitution, and the liberties of this country. Their ranks should always be well filled, and it is a pity that there should be now any vacancies left open in the appointments of their leaders, the Queen's Serjeants, who are an old institution of the State.—*Law Review*.

## ST. LEONARDS ON CAMPBELL.

*Misrepresentations in Campbell's lives of Lyndhurst and Brougham corrected by St. Leonards.*  
London: John Murray.

The nonagenarian ex Chancellor is as plucky and almost as vigorous as was the Sir E. Sugden of half a century ago. Last week the learned and venerable lord appeared in the witness-box and gave his evidence not only with lucidity, but he also showed the counsel who cross-examined him that he could still hold his own in a legal fight. A yet more conspicuous witness of the unfailing powers of Lord St. Leonards is his reply to some of the misrepresentations in *Campbell's lives of Lyndhurst and Brougham*. Before the posthumous volume of Lord Campbell's work was nine days old, Lord St. Leonards was out with his rejoinder. We are of opinion that the learned lord need not have been at the pains of answering the statements of a work which has been, so far as we know, censured by the whole world of critics. The lives of Lyndhurst and Brougham are such a gross caricature that no one can be deceived. It seems that Lord Campbell could not think well or write fairly of any lawyer who was contemporary with him. It was his opinion that his rivals were vastly inferior in intellect and moral character to John Campbell, and it was his apparent object in preparing the last volume of his *Lives* to inform a benighted world that in the nineteenth century there was only one great and worthy lawyer, and that eminent and exceptional individual was John, Lord Campbell. However, we can hardly be surprised that Lord St. Leonards could not resist the temptation of exposing some of the misrepresentations that especially relate to himself.



## SOLICITOR'S DUTY OF KEEPING ACCOUNTS—EVIDENCE OF FOOTMARKS.

Lord Campbell tells a story about a dispute in Court between Lord Chancellor Brougham and Sir E. Sugden, and he adds that the latter was laughed at. This Lord St. Leonards denies, and tells us what really occurred. Lord Brougham was in the habit of reading and writing letters in Court, and Sir E. Sugden very properly refused to go on with an argument whilst the Lord Chancellor was plainly and even ostentatiously engaged in letter-writing. The Lord Chancellor made a testy remark, but there was no demonstration; and afterwards, if he had occasion to write a letter, he did so on the open note-book, and in a manner that did not attract attention.

There was an unfortunate difference between Lord Chancellor Brougham and Sir E. Sugden, which was the subject of a sharp debate in the House of Commons, the report of which is copied from 'Hansard,' and given as a supplement to this little book. Lord Brougham attacked Sir E. Sugden, and used a very improper epithet. Even before Lord Brougham went out of office the quarrel was adjusted, and says Lord St. Leonards:—'Lord Campbell knew that for many years Lord Brougham and I were on terms of friendship, but as his book would not be published until after Brougham's death, he was safe in reviving in its most odious form an attack which Lord Brougham had lived to regret and to atone for.' No doubt the account of Lord Campbell is one-sided, and, we must say, exceedingly spiteful. Lord St. Leonards remarks, 'His object was to strike at me. This he dared not do during our joint lives; but it might be partially accomplished by leaving his book as a legacy to be published after his own death, without regard to what was due to me, if living.' We shall not comment on the rest of the misrepresentations exposed by the learned and venerable lord, as we have already devoted considerable space to a review of the volume by Lord Campbell. Whilst living, Lord Campbell professed much friendship and admiration for Lord St. Leonards. So he did for Lord Brougham, but that did not prevent him preparing a vituperative biography. Lord St. Leonards is indignant with the treatment of Lyndhurst and Brougham, and remarks that 'their lives remain to be written.' We shall soon have the biography of Lord Brougham, and meantime Lord St. Leonards may rest assured that no one will think any the worse of either Lord Brougham or Lord Lyndhurst on account of the misrepresentations of Lord Campbell.—*Law Journal*.

## SOLICITOR'S DUTY OF KEEPING ACCOUNTS.

*Re Lee, L.J., 17 W. R. 108.*

A Solicitor stands in this respect upon a very different footing from an ordinary agent. It is the duty of the latter to keep regular accounts and preserve the vouchers, at the peril of being disallowed every claim which he cannot possibly substantiate. If he does not do

this, it amounts to a fraud in equity. But a solicitor, though it is very reprehensible of him not to keep accounts, will not be treated in the same way as an ordinary agent or receiver, if he has not done so. Considering how complicated is the relationship between solicitor and client, extending over so many years, as it often does, it would be strange indeed if the solicitor did not meet with more consideration in the eye of the Court than an ordinary agent under such circumstances. Irregularity in keeping accounts as a solicitor, Lord Eldon said, in *White v. Lady Lincoln*, 8 Ves. 363, "is not a ground for saying that he shall make no demand. It will press him with more difficulty in making the demand, but if finally he can make it out by documents and proofs which the Court can receive, he must be paid." The Lords Justices took the same view of the rule in equity in deciding the present case, namely, that the omission to keep accounts was not a ground for depriving the solicitor of his proper taxed costs for the business done. In *White v. Lady Lincoln*, it is true, Lord Eldon refused to allow a charge for business done by a solicitor, who had kept no regular accounts. But it is to be observed that this solicitor had acted as auditor, steward, and agent also, had kept no regular accounts in any of those capacities, and had kept no vouchers except those in his own favour; and was therefore treated as a general agent, bound in duty to keep regular accounts. But in the present case the business done by special arrangement had been paid for separately, and was distinguishable from the general business, in respect of which no formal account, item by item, could be rendered. From a comparison of the present case with *White v. Lady Lincoln*, it would seem that if a solicitor acts as an agent out of his professional sphere, like any other agent he must keep formal accounts at his peril; but in charging for ordinary professional business it is enough if, in the absence of formal entries in his books, he can make out that the business has been actually done, by such secondary evidence as the Court can receive, and he will not be permitted to lose his costs altogether, merely because he has failed to keep his books with mercantile regularity.—*Solicitors' Journal*.

## EVIDENCE OF FOOTMARKS.

About four years ago, as we learn from a paragraph in the *Times*, a man named Harris was convicted of cutting out the tongue of a neighbour's horse by night. The evidence was solely that of footmarks. The sentence was eighteen months' imprisonment, which told so on the prisoner that he died. Since then his innocence has, it is said, been completely established.

Of all evidence habitually adduced before magistrates, at quarter sessions, and at assizes, there is scarcely any so common as that of

## Selection.]

## DIAMOND V. GRAY.

## [Com. Law Cham.]

footmarks, and certainly none so worthless. "I found footmarks,—I compared them with the prisoner's boot;—They corresponded exactly." If the tracks *do* exactly fit the boots, they are the strongest evidence that the boots, with probably the prisoner in them, assisted at whatever was done when the tracks were made. Unless the tracks fit *exactly*, they are no evidence at all. Now the value of the above statement, as usually received in evidence from the mouth of a rural policeman, or other witness, will be more correctly appreciated if you consider the process which would be requisite in order to determine that the tracks do fit exactly. A mere eye comparison of the shape of the sole with the edge of the track is clearly not enough, because scores of men may wear their boots into very much the same shapes, especially if made by the same maker. Nor is it enough to count the hob nails, because a country cobbler will very likely have a set pattern and a set number of nails for all boots of a certain size. The orthodox plan, when the print is yet plastic, in wet clay or garden mould for instance, is, we believe, to press the boot down into the print, and then stand aside and see if the fit looks all right. It is true that the sole is the crucial test, and that while in the print no one can see the sole; but the plan has this advantage, that the firm pressure in the soft soil produces in the old print a new one, which, *ex necessitate*, must correspond exactly with the boot. In many cases a very accurate admeasurement with compasses would be necessary to test the correspondencies of the two, and in many other cases, from the imperfection of the print the test is impracticable.

The prisoner's advocate ought always to examine the witness minutely as to the process by which he satisfied himself that the boot corresponded with the track. A few months ago a case occurred in which a prisoner, being charged before a clerical magistrate, on the evidence of a constable who deposed in the usual form that the prisoner's boot fitted the footmark to a nicety, the worthy clergyman took the boot in his own hands and personally compared it with the marks. The first thing he did was to look at the nailmarks, when to his surprise he found that neither in number nor pattern did they correspond with the nails in the boot. The prisoner, of course, was acquitted; but, unless the magistrate had made this discovery, he would, in all probability have been committed on this blundering evidence.—*Solicitors' Journal*.

A wife cannot execute a deed; which is, perhaps, the reason why Shakspeare, who was a first-rate lawyer, made Macbeth do the deed, which lady Macbeth would have done so much better, had not a deed done by a woman been void to all intents and purposes.—*Comic Blackstone*.

## ONTARIO REPORTS.

## COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law, Reporter to the Court.)

## DIAMOND V. GRAY.

*Change of venue—Preponderance of convenience and expense.*

A defendant when applying to change the venue on the ground of preponderance of convenience and expense, should suggest in his affidavit the number of witnesses the plaintiff is likely to call, and where they reside. Cases on applications of this kind considered.

[Chambers, March 6, 8, 1867.]

The defendant obtained a summons to change the venue from the County of Lennox and Addington to Prince Edward, on an affidavit which stated, amongst other things, that the action was brought for the conversion of plaintiff's goods; that the declaration had been served but no plea pleaded; that the cause of action, if any, arose in the County of Prince Edward and not elsewhere: that deponent had "reason to believe and does verily believe that at least ten witnesses will be called to support the defence in this action;" that it would probably be very difficult to reach the County Town of Lennox and Addington, and that the trial would be attended with very much greater expenses if tried there than if tried at the County Town of Prince Edward.

*Oster* shewed cause, referring to Ch. Arch. 12 ed., pp. 1352, 1353.

Gwynne, J.—*Dr. Rothschild v. Schilston*, 8 Ex. 503, decides, in accordance with a report made by a committee of Judges to whom the subject was referred, that the application to change the venue may be made either before or after issue joined, as may be most convenient, but if the application be made before issue joined it is requisite that the party applying should state in his affidavit all the circumstances on which he means to rely. He will not be allowed to add to or amend his case when cause is shewn. He may, however, if he choose, rest his application that the cause of action accrued in the county to which he wishes to remove the case, but if he does he may be answered by any affidavit negating this fact, or shewing that the cause may be more conveniently tried in the county where the venue is laid. If the application is made after issue joined, the party applying must in his affidavits, in support of the application, shew that the issues may be more conveniently tried in the county to which it is proposed to change the venue. *Smith v. O'Brien*, 26 L. J. Exch. 30, is to the same effect. There it is said the general rule is to try the cause where the witnesses reside; but to this rule, however numerous the witnesses may be, and however great the expense in procuring their attendance, there is an exception, as if it can be made to appear that a fair trial cannot be had in the county to which it is sought to be changed: *Penhallow v. Mersey Harbour and Dock Co.*, 26 L. J. Ex. 21.

When the ground of the application is the expense attending the trial in the county where the venue is laid, the preponderance of convenience must be very great. In *Thornhill v. Oastler*, 7 Scott, 272, the rule was refused, although

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the defendant stated that in order to establish a set off which he had pleaded it would be necessary to unravel accounts of eighteen years' standing: that he had sixty witnesses to examine, all of whom resided in the county to which he sought to remove the case, and that the additional expenses of trying it where the venue was laid would be more than £2,000, which he was wholly unable to bear. Tindal, J., here says, "The plaintiff's right in a transitory action to lay the venue where he pleases is undoubted; and before we deprive him of it we must be clearly satisfied that justice cannot be done between the parties unless we do so." From *Johnson v. Berrisford*, 2 C. & M. 222, it would seem to be necessary to shew that the defendant has a defence: and from *Helliwell v. Hobson*, 8 C. B. N. S. 761, it would seem, unless the case is imperfectly reported, that the defendant applying to change the venue upon ground of convenience must shew that the convenience greatly preponderates in his favor, and that for that purpose he should give some evidence of the number of the plaintiff's witnesses so as to shew that the probable expense to him, for in that case the rule was refused, although the defendant swore the additional expense of his own witnesses, if the trial should take place in the county where the venue was laid, would be £80 more than in the county to which he wished to change it, although there were no affidavits by plaintiff shewing the number of his witnesses. Crowder, J., says, "The plaintiff had a right to lay his venue when he chose, and it is not shewn what witnesses he may have. I therefore do not think the defendants have made out any case to entitle them to a rule. It should at least be made to appear that the convenience greatly preponderates in defendants' favor."

A preponderance of convenience greatly in favor of a defendant can scarcely be made to appear unless the cost and convenience to the plaintiff is taken into consideration, and if he abstains from producing any affidavit how can it be said to be made to appear? It would seem therefore that in order to institute some comparison it is incumbent upon a defendant to suggest at least what number of witnesses the plaintiff is likely to have to call, and where they reside; and this is done in some of the cases reported, while in others there is an avowal that the general cost of trial at the one place would be much greater than at the other.

In the case before me, there is an affidavit filed both on behalf of the defendant and the plaintiff, and forming what opinion I can upon them, the balance of convenience appears to me to preponderate in favor of letting the venue remain where it is, which appears more convenient, taking into consideration the convenience of all parties. The summons will therefore be discharged, costs to be plaintiff's costs in the cause.

*Order accordingly.*

#### LOWE V. MORRICE.

*Costs—Consent to verdict—Rule silent as to costs.*

Verdict for defendant—Rule for new trial unless defendant should consent to verdict for plaintiff for nominal damages, no reference being made as to costs. The defendant consented, and plaintiff asked for the costs of the rule. Held that plaintiff was entitled to the costs of the application for new trial and the rule granted thereon.

[Chambers March 9th 1869].

This was an action on a bond, three breaches being assigned. The plaintiff recovered on the first breach, defendant on the second and third. The plaintiff moved in term for a new trial because of misdirection as to the second and third breaches. The court said the rule would be made absolute, unless the defendant, who had in fact paid the claims under these two last breaches, but who was not in strict law entitled to get the benefit of the payment by plea, should consent to a verdict being entered on these breaches for the plaintiff with nominal damages. The defendant consented to this and the rule was drawn up accordingly.

The Master declined to allow to the plaintiff the costs of the application in term and the rule finally granted thereon.

Against this decision of the Master the plaintiff appealed, and a summons was taken out to revise the taxation by allowing to the plaintiff the plaintiff's costs of moving the rule nisi for a new trial, and of the argument thereof, and of the rule absolute granted to enter a verdict for the plaintiff in this cause, as in said rule absolute mentioned, or such of the costs of said proceedings as the presiding judge should think fit.

*Harrison, Q. C.* shewed cause, citing *Marshall* on costs 158; *Wilson v. L. & Y. R. W. Co.*, 9 B. N. S. 647; *Patterson v. Corporation of Grey*, 18 U. C. Q. B. 189.

*Jno. B. Read* contra, cited *Robertson v. Liddell*, 110 East 416; *Jackson v. Hallam*, 2 B. & Al. 317; *Delisser v. Towne* 1 Q. B. 333; *Stewart v. Mathieson*, 10 U. C. L. J. 245.

ADAM WILSON, J.—I entertained on the argument, before the cases were cited, a strong opinion against the application. The authorities referred to for the plaintiff show that in such a case the consent given in term that the verdict should be entered for the plaintiff should be considered as having been given at the trial, and the plaintiff having succeeded should get the costs of the rule.

Perhaps the better way of putting it is, that the consent of term has put an end to the cause; the result is that the defendant has failed; the plaintiff has succeeded in the cause and therefore gets the costs of the cause, and the costs of the application in term are part of the costs of the cause, for by and through such proceedings the cause has been successfully terminated for the plaintiff.

This is a matter of practice which when once settled should be followed, and it is I think settled by the decision before mentioned. It is not an unreasonable view to take as between the parties, for the defendant has confessed himself entirely as the wrong. Such is not the conclusion at which I should have arrived without the precedents already mentioned.

The order will therefore be granted for a revision but without costs.

*Order accordingly*

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IN RE. HUNTER V. WILSON—SHARP V. MATHEWS.

[Insolv. Case.]

## IN RE RUMBLE V. WILSON.

*Contract or tort—Jurisdiction.*

A plaint charging that the defendant hired of plaintiff a horse, &c., to go from A. to B. and back, and agreed to take good care of same as a bailee, &c., with an avowment that the defendant so carelessly, &c., drove said horse, &c., that horse was killed, &c., is a plaint in contract and not in tort.

[Chambers, March 10, 1869.]

Summons issued on 29th January last, calling on parties to shew cause why a writ of prohibition should not be issued after judgment pronounced. The statement of the cause of action was as follows:

"For that the defendant hired of plaintiff a horse, harness, and buggy, in October, 1868, to go from Maple Village to Pine Grove and back, and undertook and agreed to take good care of the same as a bailee, and the plaintiff alleges that the law required him so to do, and to return the said property in safety to him again. And the plaintiff further states that the said Albert Wilson so carelessly drove and used the said property that the said horse, harness, and buggy, were not returned in safety to him, nor were the same used with care, but on the contrary with negligence and carelessness, in consequence of which the horse was killed, the buggy was broken to pieces, and the harness broken, whereby further the plaintiff saith he hath suffered damage to the amount of \$85." The cause was tried before a jury who found for the plaintiff.

It was said that a new trial was moved for but refused, and that this was the second action that had been brought, the plaintiff having been non-suited in the first because he happened unavoidably not to be present; and that no question of want of jurisdiction was ever raised.

Boyd shewed cause, and contended that the plaint was not in tort, but in contract: *Mayer of London v. Cox*, L. R. 2 E. & J. app. 280; *Morris v. Cameron*, 12 U. C. C. P. 422; *Jennings v. Rundell*, 8 T. R. 835; *Jones on Bailments*, pp. 69 to 68; *Story on Bailments*, 411; *Lloyd's C. C. Prac.* 221; *Noys' Maxims*, (Bythewood's ed. 791.) If objection had been taken at the trial the particulars could have been amended.

F. Wright, in support of the application, argued that the Division Courts Act recognizes the distinction between contracts and torts, and that the question was whether the action was maintainable without reference to any contract, and is founded on contract though framed in tort: *Bullen & Leake*, 102, notes 2nd ed., 121 3rd ed., citing *Pozzi v. Shipton*, 8 A. & E. 968; *Marshall v. York &c.*, R. W. Co., 11 C. B. 655; *Talton v. G. W. R. Co.*, 2 E. & E. 844; *Legge v. Tucker*, 1 H. & N. 500; *Ansell v. Waterhouse*, 6 M. & S. 385; and in such a case the Judge should look at the actual facts as well as at the plaint and particulars: *In re Miron v. McCabe*, 4 Prac. Rep. 171.

A. WILSON, J.—In *Jennings v. Rundall* it was decided that a cause of action founded on contract cannot be declared on as a tort so as to exclude the plea of infancy; that to such a tort infancy may be pleaded because it is founded on contract. In that case the defendant was charged with immoderately driving the plaintiff's horse, by means of which it was injured. The count

was, "that the plaintiff on, &c., at the request of the defendant, delivered to the defendant a certain horse of the plaintiffs, to be moderately ridden, yet defendant contriving and maliciously intending, &c., wrongfully and injuriously rode the horse, &c."

The authorities to which I have been referred, shew that the plaintiff could not have proved his case without first of all proving a contract for the particular act of hiring. In this respect an action against a common carrier differs from ordinary bailments, for against the common carrier there is a special customary common law obligation, which renders him liable upon his duty independently of contract altogether.

In this case, suppose there had been two persons who had hired the horse, and only one had been sued, could he not have pleaded the non-joinder of the other? I think he could.

The plaint or particulars here shew that the defendant "undertook and agreed to take good care, &c.," which is certainly a contract: *Chitty on Pleading* (6th ed. 87.)

The fact that the defendant got a non-suit on this same complaint, which he could not properly have got if the court had no jurisdiction, and the fact that he moved for a new trial—which he could not have got either—show, as the fact is alleged, that the defendant never set up the want of jurisdiction, and therefore that no want of jurisdiction ever appeared by the evidence, and none, I think, appear on the face of the proceedings, but the contrary.

I have delayed this in consequence of the pressure of term business, and not for any difficulty in coming to a conclusion, for the opinion I express now is the same as that which I stated during the argument.

*Summons discharged without costs.*

## INSOLVENCY CASES.

## SHARP &amp; SECORD V. ROBERT MATHEWS.

*Insolvent Act 1864, sec. 3, cl. c. and sub-sec. 7—Writ of attachment, Grounds for—Affidavit—Form of, and who can make.*

The mere intention on the part of a debtor to dispose of his property, and the apprehension of his sole creditor that he will not then, although perfectly able, and owing no one else, pay the creditor his debt, does not bring the debtor within sec. 3, clause c., of the Insolvent Act, 1864.

In entitling affidavits for an attachment under the Insolvent Act, 1864, form F. should be followed.

Ecc. 3, ss. 7, is complied with, although the creditor or his agent who swears to the debt is also one of the two persons testifying to the facts and circumstances relied on as constituting insolvency.

[Chambers, Jan. 26, 29, 1869.]

On the 6th of January, the Judge of the County Court of the county of Wentworth made an order for a writ of attachment to issue out of that Court against the above named defendant, as an insolvent, at the suit of the above plaintiffs. On the 7th of January the writ was served. On the 9th of January the defendant filed his petition in the County Court praying that the writ of attachment might be set aside. The petition was accompanied with the affidavits of the defendant, and of two other persons, testifying to the *bona fides* of the transaction, which the plaintiffs assailed as exposing the defendant to

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compulsory liquidation under the Insolvent Act. The petition also assailed the proceedings of the plaintiffs as defective in the following particulars: 1st. That the affidavits filed by plaintiffs disclosed no grounds to warrant the order and writ of attachment. 2nd. That they shewed that defendant was not insolvent. 3rd. That they afforded no sufficient evidence that he had parted with his estate and effects with intent to defraud, defeat, or delay creditors. 4th. That the said affidavits are entitled in a cause, whereas there was not, until the issuing of said writ, any cause in Court.

Upon this petition a summons was issued, calling upon the plaintiffs to shew cause why the writ of attachment should not be set aside. Upon this summons being heard, the Judge, on the 19th day of January, made an order setting aside the writ of attachment, and all subsequent proceedings on the merits.

Notice of an application for allowance of an appeal from this order was given. On its return, *J. B. Read* opposed the allowance, as well on the grounds stated in the defendant's petition in the County Court as on the merits disclosed in the affidavits filed by the defendant with that petition.

GWYNNE, J.—I am of opinion that no appeal should be allowed in this case, and that the order of the Judge setting aside the writ of attachment was a proper one to be made in the premises. The affidavits filed, on which the writ of attachment issued, do not, in my opinion shew that the estate of the defendant has become subject to compulsory liquidation. It appears by the affidavit of the plaintiff, George Reid Secord, that the plaintiffs are the defendant's sole creditors: that within a few days preceding, the defendant had sold and disposed of real estate in the city of Hamilton for \$1,900, receiving in payment therefor cash and mortgages, and that he is now about to assign said mortgages with intent, as the deponent believes, to defraud the plaintiffs of their said debt: that the defendant has not, to the best of deponent's knowledge and belief, any other assets or property of any value that are or can be made liable for the payment of the said debt: that the debt has been overdue for some time—that, in brief, he has the means of paying the plaintiffs' debt, which is the only debt due by him, and that he refuses to pay it, or to give the plaintiff any satisfaction as to what he is going to do with the proceeds of the sale of the land further than that he would pay his debts, and that, with reference to the plaintiffs' claim, defendant said that he would pay just as much as he had a mind to. The affidavit has attached to it a copy of a letter from a gentleman acting as solicitor of the defendant, in which the defendant disputes the correctness of the amount of the plaintiffs' claim and offers, without prejudice, \$200 for a discharge in full. There was also an affidavit of the plaintiffs' book-keeper, deposing to the correctness of the amount claimed by the plaintiffs, viz. \$500. This deponent also swears as follows: "I am credibly informed and verily believe that the defendant has lately disposed of his property and is now about to assign and dispose of the mortgages taken by him for the balance

of the purchase money thereof, with intent to defraud the plaintiffs of their debt." There was also an affidavit of Mr. Gibson, a solicitor, who deposes as follows: "I am aware of the defendant having, during the past week, sold lot number three in Moore's survey of this city, a portion thereof to one George Matthews for the sum of \$700, and the remainder of the said lot to one Robert Kelly for the sum of \$1200. The said Robert Kelly paid in cash the sum of four hundred dollars and gave a mortgage to the said defendant for the balance of \$800. I am not aware what amount was paid down by the said George Matthews, but I think there was about \$300, and a mortgage was given by the said George Matthews to the defendant for the balance. In the carrying out of said sale I acted for Robert Kelly, one of the purchasers, and in the course of the transaction, Mr. Sadleir, solicitor for said defendant, said, in my presence, that he would want to have access to the abstracts of title as he was going to negotiate the mortgages."

Now these affidavits show that the sale of the land was *bona fide* for value, and all that the application for the attachment rests upon is the affidavit of the plaintiff Secord and that of his book-keeper, that in their belief the defendant is about to assign them with intent to defraud the plaintiffs of their claim, without any facts or circumstances being stated or at all shewn to lead to that belief, unless it be what is stated in Mr. Gibson's affidavit that Mr. Sadleir said he would want to have access to the abstracts of title as he was going to negotiate the mortgages. Now if the intended disposition of the mortgages is by actual sale of them and not a *fraudulent* disposition of them, I apprehend that the entertaining such an intent to make an actual sale would no more expose a person to compulsory liquidation than the actual sale itself would. The whole gist of the affidavits of plaintiff and his book-keeper must, I think, be taken to be merely that the defendant intends to make sale of his property, that is, an actual out and out sale; but that they apprehend he will not then, although perfectly able and owing no one else anything, pay the plaintiffs their debt. I do not think the entertaining such an intent brings the party entertaining it within the clause c of the 3rd sec. of the Insolvent Act. But then, in his petition to set aside the writ of attachment, the defendant swears that he sold the land to pay off a mortgage upon it, by which he was subject to 10 per cent interest: that he has paid off that mortgage, and that he does intend to sell the mortgages taken by him for balance of purchase money for the purpose of paying the plaintiffs what he believes he owes them and of supporting his family, and he denies that he owes the plaintiffs anything like the amount claimed by them to be due. This affidavit is accompanied by affidavits of George Matthews and Kelly, who swear that their purchases were *bona fide* and made for full value. I can see nothing in the affidavits to justify a suspicion of fraudulent disposition of property, of an attempt fraudulently to dispose of property within the meaning of the Insolvent Act.

I have been asked to express my opinion upon two minor points which in the view I take

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## SHARP V. MATHEWS—BAILEY V. BLEECKER.

## [C. C. Cases.]

are not necessary to be decided in this case, namely, whether the affidavits filed in the application for the attachment are properly entitled, and whether sub-sec. 7 of sec. 3 requires that the two persons to speak to the facts and circumstances constituting insolvency within the meaning of the Act, must or not be other persons than the creditor or his agent testifying to the debt. I entertain no doubt that it is proper to entitle the affidavits with the names of the plaintiffs and defendants as in the form F given in the statute. The 18th sub-sec. of sec. 11 enacts that the forms appended to the Act, or other forms in equivalent terms, shall be used in the proceedings for which such forms are provided, and it appears to me to be always best to follow the forms given by an Act. The very first paragraph of the affidavit speaks of a cause, although, strictly speaking, there is none until the writ issues, and of a plaintiff in the cause. The second speaks of "the defendant" as likewise does the third. These expressions plainly point to the cause in the title of the affidavit, and if this should be omitted the frame of the body of the affidavit would be insensible.

It appears to me also that sub-sec. 7 of sec. 3 is complied with, although the creditor or his agent deposing to the debt should be also one of the two persons testifying to the facts and circumstances which are relied upon as constituting the insolvency. I see no reason why we should introduce into the statute the word "other," which the legislature has not thought fit to introduce between the words "two" and "credible persons" so as to make it read "and also shew by the affidavits of two other credible persons," &c. It might be that a creditor and his clerk could give the clearest evidence of insolvency and liability to compulsory liquidation from the lips of the debtor himself to them in private which could not be established otherwise, and in such case, although there were two credible persons, the attachment might be deferred injuriously to the creditors, but whether it would be desirable or not desirable to have two persons other than the creditor to speak to the acts of insolvency it is sufficient to say that, in my opinion, the statute does not say that it is requisite. It is said that the preceding clause indicates the intention of the legislature that in Upper Canada the creditor should not be one of the two because it provides that in Lower Canada the creditor alone may prove the debt and the acts of insolvency. Why the creditor alone should be deemed sufficient in Lower Canada and not in Upper Canada I cannot say, but I see no necessary inference from that, that he cannot be one of the two required in Upper Canada. If the legislature intended to exclude him it would have been very easy to have done so by the insertion of the word "other," moreover the form of affidavit given is the same in Lower Canada and Upper Canada for the creditor to make, and plainly contemplates that he may state the facts relied upon as rendering the debtor insolvent.

## COUNTY COURT CASES.

## BAILEY V. BLEECKER.

(In the County Court of the County of Hastings, before His Honor Judge SHERWOOD.)

*Trespass—Jurisdiction—Title to land—Ousting Jurisdiction.*

One H. sold to defendant timber standing on his land, and afterwards conveyed and gave possession of the land to plaintiff. The defendant proceeded to take off the timber. Held, that the title to land was not in question, and that trespass to land would lie in the County Court.

This was an action of trespass. The declaration contained two counts: 1st. trespass to the N. W.  $\frac{1}{4}$  of lot 26, in the 13 con. township of Huntingdon. 2nd. That defendant converted to his own use and possession certain trees of the plaintiff's.

On the trial the plaintiff after proving that defendant entered on the N. W.  $\frac{1}{4}$  of lot 26, in 13 con. of Huntingdon, and cut down and cut into saw logs a certain number of trees and took them away, put in a deed from one Hicks to the plaintiff of this portion of lot 26. He also gave evidence that plaintiff had also used acts of ownership over it, by taking off building timber, staves, and waggon spokes; and that there was a fence between this and the remainder of the lot occupied by Hicks. The plaintiff finding his evidence applicable to lot 6 instead of 26 mentioned in the declaration, asked leave to amend and the defendant's counsel asked leave, if leave to amend, granted to plead anew, which was granted, on condition that he should be at liberty to do so. The plaintiff's counsel declined the amendment on these terms. On the part of defendant, his foreman swore that he purchased the timber from Hicks, and paid him for it. The lot was shewn from the evidence to be a wild lot, not enclosed.

At the close of plaintiff's case, defendant's counsel moved for a nonsuit, on several grounds which were overruled. The case went to the jury, and verdict for plaintiff.

In last term defendant moved for a new trial on the grounds: 1st. that plaintiff did not prove that he ever possessed the land on which the alleged trespass was committed, *nor any title thereto.*

2nd. That the judge permitted plaintiff to produce and prove the consideration of a deed from one Hicks to plaintiff, without which no right of action could have been made out in plaintiff. He also asked for a stay of proceedings, on the grounds that the title to lands came in question, and that on production and proof of the title from Hicks' title was at once brought in question.

SHERWOOD, Co. J.—It appeared in evidence that Hicks was in possession of the whole of lot number 6, as much as any person could be in possession of a wild lot, and that while in such possession, he conveyed the north-west quarter, on which the trespass was committed, to the plaintiff. This appeared to me at the trial (and I have seen nothing since to change my opinion), to give him a sufficient possession, taken with the acts of ownership exercised by himself to enable him to maintain this action. He proved a *prima facie* title, which was not in any way controverted by the defendant.

The question of jurisdiction is an important one, and on the whole, I cannot say, I am free from doubt. The County Court Act gives to that Court, jurisdiction in any action except the cases

\* The defendant shortly afterwards sold the mortgages and absconded from the country.—*REF.*

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referred to in the 16th sec.; and the first of them is where the title to land comes in question.

In order to the proper decision of this case, we must enquire if the title to land is here brought in question.

It is laid down in the books that the mere assertion of a title without proof of it, is not to be taken by a court as ousting it of jurisdiction. In the present case no evidence of title in the defendant was given. It is true that evidence was given, that the foreman of the defendant purchased the standing timber on the lot in question from Hicks. There was nothing to shew that he, after his conveyance to the plaintiff, had any title in it. The mere fact of a person having sold the timber to the defendant, whether he once owned the land on which it stood, or not, is not evidence of title. The counsel for the defendant did state that the land had been conveyed to the plaintiff by Hicks, his stepfather, to enable him to vote at an election, but no evidence was given to substantiate it. It is doubtful if there had been evidence to that effect, if it would have been evidence of title.

The County Court Act seems to me to authorize this court to try trespasses to land, as well as other suits in which the title does not come in question. I think that no further than by the assertion of the want of title in the plaintiff by the defendant the title came in question, and I do not consider that sufficient to oust this court of jurisdiction.

The defendant is entitled, I think, to judgment, on the issue to the first count. The verdict should be amended to correspond, as it was a mistake for it to be taken as general. I discharge the rule on condition of this being made a part of the rule.

#### SNIDER V. BANK OF TORONTO.

*Interpleader—Claimant—Execution creditor—Insolvency—Bill of sale—Fraud—Defeating or delaying creditors—Fraudulent preference—Change of possession—Jurat.*

Bill of sale of merchandize executed by S. and G., the consideration of which was for a pre-existing debt and cash he then advanced by S. to them. It was admitted, that they were unable to pay their debts in full. S. and G. made the transfer at the request of the plaintiffs; and with the cash they received, they paid one debt they owed by 10s. in the £, and other small debts they paid in full in cash. The rest of the cash they offered, though not accepted, to pay 10s. in the £ to C. & C., who were holders of the notes sued on by the defendants in the original action.

The jury were told that if the object of the sale was merely to prevent other creditors from enforcing their claims, or of giving plaintiffs a preference as against the defendants or other creditors, it would be void.

*Held*, on the authority of *Wood v. Dixie*, 8 Q. B., 892, and *Graham v. Furber*, 14 C. B., 414, that it should have been left to them to say whether the sale to plaintiff was *bona fide*, for the purpose of relieving the execution debtors from the necessity of a forced sale of their goods, or for the mere purpose of protecting them from the claims of other creditors, in which latter case it would be void. But as the jury found generally for the plaintiffs, a non-suit was refused.

*Held*, that it was no objection to the jurat of an affidavit that it did not shew that the two bargains were severally sworn

**SHERWOOD, Co. J.**—Interpleader to try the ownership of property seized on an execution, against the goods of Henry Colborne Snider and Nehemiah Gilbert, who formerly were in the business of grocers: and contracted the debt for which judgment was obtained against, and for which the

execution issued. These parties commenced business in October, 1867, and in the month of May following sold and transferred to plaintiff by bill of sale, duly registered, the goods they then had on hand, at the invoice price amounting to the sum of nine hundred dollars or thereabouts; the consideration was paid partly by notes, which plaintiff had endorsed, and retired previous to the sale and partly by notes paid by them afterwards in cash. The defendants in the original action were examined as witnesses, and stated that finding themselves unable to pay their debts, at the request of the defendants, they made the transfer, and with the cash they received they paid one debt, they owed at the rate of ten shillings in the pound, and other small debts in cash, and the balance of cash they divided between them, having first offered to pay Messrs. Clark & Clayton, who were at that time holders of one of the notes, and at the rate of ten shillings in the pound. They further stated that the business had been carried on in the same place by the plaintiffs, and Henry Colborne Snider went into their employment as clerk. The bill of sale was put in and proved.

The counsel for the defendants objected to the bill of sale as insufficient. The case went to the jury. I directed them that if they thought the younger Snider & Gilbert were unable to pay their debts, at the time of the execution of the bill of sale and the sale was made with the intention of delaying the defendants, or of giving preference to the plaintiff or other creditors in the recovery of their debts, the sale was void; and their verdict should be for the defendant, as far as the articles in the schedule attached to the record were transferred by them. On the other hand, if they found they were not insolvent and did not transfer for the purpose above mentioned, they must find for the plaintiffs.

In January term, 1869, defendant moved for a new trial, on the grounds that the verdict was contrary to law and evidence, that it was perverse and against the weight of evidence and contrary to the judge's charge. And for misdirection or non-direction in my not having decided that the evidence shewed that young Gilbert & Snider were unable to pay their debts in full, when the assignment was made and for not telling the jury that the evidence and case of plaintiffs shewed that the transfer was made for the purpose of defeating or delaying the creditors, of the transferrer, or with the intent of giving one or more of their creditors a preference. And that I should have directed a verdict for the defendants, at any rate, for the goods and chattels found to have belonged to the transferrers, and transferred. And that the transfer relied on was void under the statute by reason of the affidavit of execution being defective. And that I was wrong in charging the jury to distribute the verdict, in case they found the several questions submitted to them in the plaintiffs favor.

With respect to the misdirection or non-direction, it appears to me the questions of insolvency and the transference of the property, to delay creditors or for giving preference to one or more creditors, was a question entirely for the jury and not for me to decide. I left it to them, and I think all the cases bear me out in it. The case

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of *Wood v. Dixie*, 7 Q. B. 892, which has been accepted as a leading case, both here and in England decides that the charge of the judge—that although the conveyance was *bona fide*—if there was an intention to defeat an execution creditor, the conveyance was void, was incorrect and going too far.

It does not make any difference since the jury found generally for the plaintiff, whether I directed them wrongly or not, as to the distribution. If the verdict had been for the defendants for any portion of property in question, then this question would have properly arisen.

With the respect to the objection to the affidavit, on the bill of sale. The objection is to the jurat and that it should have stated that the vendees were severally sworn. In the absence of any case upon this point, I am not prepared to pronounce the instrument void, on that account; and, even if it was, there is evidence I think of change of possession sufficient to meet the requirements of the law.

With respect to the objection that the verdict is contrary to law and evidence, and perverse, and against the weight of evidence, I must confess I have had great difficulty in coming to a conclusion, but on the whole, when I recollect that the plaintiffs paid full value for the goods—that the transfer was not only for the consideration of debt, already accrued, but for money advanced at the time of the execution of the bill of sale, I am not prepared to say that the jury was wrong in coming to the conclusion, that the transfer was not made, with the intention of defeating or delaying the defendants, or giving a preference to the plaintiffs or other creditors.

I discharge the rule.

### PROBATE.

#### IN RE GOODS OF SNIDER, DECEASED.

(In the Surrogate Court for the County of Hastings.)

*Deed—Testamentary paper—Will revocable—Cancellation of administration—Probate.*

One S. died in 1867, leaving his next of kin, who, believing that S. died intestate, obtained administration. G. afterwards found an agreement and will under seal of S. in the same paper in the possession of F. the only witness to its execution. By this paper S. agreed to convey part of a lot of land to G. on certain conditions. S. owned at the date of the paper, the other half of the same lot, and also some personalty. By this paper, in case the conditions were performed, S. devised *all his real and personal estate* to G. and his heirs. Some years after the date of the paper, S. conveyed the other half of the lot to G. the devisee and took a mortgage for the balance of the unpaid purchase money.

*Held*, that this paper was a will and not a deed and therefore not revocable, but although the subsequent conveyance to G. and reconveyance by way of mortgage to S. might have the effect of revoking *pro tanto* the will relating to the realty—yet it had not the effect of revoking it as to the personalty.

*Held*, also, that it was a good will of the personalty, notwithstanding it devised real estate and only one witness of its execution.

*Held*, also, that the letters of administration must be brought in and cancelled, and the paper admitted to probate.

SHERWOOD, Co. J.—The petitioner David Glover asks to have the letters of administration of the estate of Snider granted to James Cole, on the 11th February, 1868, revoked, on the ground that the said Snider made a will in his favor dated 1st March, 1860. He files a writing of that date made by Snider in the presence of

one James Farmer, who was called and proved its execution. He states that petitioner and Snider came to him and stated an agreement that they had entered into between them, and that Snider afterwards came to him to have it reduced to writing, which he did, and after it was read over to him, Snider signed it. The writing sets forth a sale of one half the lot Snider was then living on to the petitioner, his wife's brother, for the sum of eight hundred dollars, to be paid at such time as Snider might want it, to enable him to pay his lawful debts. It states a further agreement, that petitioner was to come and live in Sniders house, and to work his land with such help as Snider might be willing to afford him. That petitioner was to dispose of anything that the farm might produce, to pay debts, and if there should be anything left after paying up all debts. (I understand it Sniders debts), petitioner was to give Snider one half. Snider further agreed not to sell or let his part of the land to any person without petitioners consent, and he further agreed, after his death whatever property he might be the owner of, either real estate or otherwise, he did bequeath to the petitioner, his heirs and assigns for ever; with this provision; that in case his wife Maude, should live longer than himself that petitioner should support her as long as she might live. He further agreed to leave the agreement with James Farmer the witness to keep for him, and that he was not to give it up unless petitioner and he should require him to do so, and also, that if petitioner should fulfil the conditions of this agreement, and that they should not call on Farmer to give up the agreement, then that the written agreement should be his last will and testament, and whatever property he might be the owner of at his death, either real or personal, he gave to the petitioner, his heirs and assigns forever. Evidence was given by the petitioner of payment of debts, by him due by Snider, and there was no evidence that Snider ever asked for the agreement, that Mrs. Snider died before Snider. On the part of the administrator it was shown that Snider had conveyed the lot (mentioned in the writing as sold to the petitioner), and had taken a mortgage for a part of the purchase money; and that he afterwards sold the rest of his land to the petitioner, taking back a mortgage for the unpaid purchase money, that Snider lived with petitioner until his wife's death, when he went to live with Cole the administrator, with whom he lived until his own death. Declarations of Snider to the effect that petitioner was to have all the property at his death made by him at different times were given in evidence to shew, that he never intended to revoke his will if it be one. On the other side it was given in evidence, that about the time of the funeral the petitioner expressed himself as having no claim on Sniders estate, and that he knew of no will. And Cole (who was examined by consent of both parties), stated, that Snider had promised to leave to him his property, and if he left him to pay him at the rate of \$3 per week for his board. It was stated that Snider told him he left petitioner because he was lonely after his wife's death and that Glovers children annoyed him.

The question is, can the writing put in evidence, or any part of it, be considered a will? If so,



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was it conditional,—have the conditions been complied with? In Williams on Executors it is stated, "There is nothing that requires so little solemnity (said Lord Hardwicke) as the making of a will of personal property, according to the ecclesiastical laws of this Realm for there is scarcely any paper writing which they will not admit as such. It is enough if the paper writing contains a disposition of the property to be made after death, though it was meant to operate as a settlement or a deed of gift, or a bond, and though such paper writing was not intended to be a will."

It appears to me that the writing comprises both an agreement and what was intended for a will; that the evidence shews that the agreement which was for the sale of a portion of Sniders land was carried out by the parties, and that petitioner did pay debts for Snider, and it does not appear that Snider at any time complained, that the petitioner had not performed his part of this agreement. It also appears in evidence that the agreement or writing, never was called for by the parties to it. There is evidence to satisfy me that the conditions have been performed. As respects the real estate, I suppose there can be no doubt, that this instrument could not be considered a valid will. But, with this we have nothing to do. The question is, is it a will or testament as regards the personality. I do not understand that if the writing is a will, that any objection was made to its due execution. Under the statute of Victoria in England, the execution of this will as regards personality would not be sufficient. The law here is still the same as in England previous to the passing of that act.

I think I am justified by the authorities cited, in looking upon the latter part of the writing proved as a will, sufficient to pass the personality, and must therefore order a revocation of the letters of administration to Mr. Cole, and direct that letters with the will annexed be issued to the petitioner.

Costs of former letters, and of this contestation to be paid out of the estate.

## ENGLISH REPORTS.

### COMMON PLEAS.

#### PEGLER V. GURNEY AND HOARE.

The expression "twenty-one days" in clause 2, of section 6, of 31 & 32 Vict. c. 125, means twenty-one days exclusive of all Sundays.

[17 W. R. 316, Jan. 11, 1869.]

This was the case of the Southampton election petition. A rule was moved for to-day on the part of the respondent Hoare, calling upon the petitioner to show cause why the petition should not be taken off the file, on the ground that it had not been presented within twenty-one days, as required by 31 & 32 Vict. c. 125, s. 6.

The facts were these:—The petition had been presented within twenty-one consecutive weekdays, but not within twenty-one consecutive days if Sundays were counted as days.

*Staveley Hill, Q. C. (Jelf with him)*, for the respondent Hoare.—The section which is against my contention is section 49 of 31 & 32 Vict. c. 125, which is as follows:—"In reckoning time

for the purposes of this Act, Sunday, Christmas-day, Good Friday, and any day set apart for a public fast or public thanksgiving, shall be excluded." I read that section as meaning that Sunday is not to be counted where the last of the twenty-one days happens to be a Sunday. [*MONTAGUE SMITH, J.*—The Act says "in reckoning time."] The word in the Act is Sunday, and not Sundays. There are two periods mentioned in clause 2 of section 6 within which, according to circumstances, the petition must be presented; one period is the twenty-one days we are discussing, and the other is the period of twenty-eight days. I contend that these periods mean respectively three weeks and four weeks, and that if Sunday comes on the last day, then, but only then, it shall not be counted.

*BOVILL, C. J.*—I am of opinion that section 49 excludes all Sundays in reckoning the twenty-one days. Your rule must, therefore, be refused as to that particular ground.

*BYLES, KRATING, and SMITH, JJ.*, concurred.

#### CHORLTON V. LINGS.

##### MARY ABBOTT'S CASE.

A woman cannot, either at common law or by statute vote for a member of Parliament to represent a borough. *Semble*, it is the same in the case of a county.

[17 W. R. 284, C. P. Nov. 7, 9.]

This was an appeal from the decision of the Revising Barrister. The following was the case:—

At a court held at the town hall in the city of Manchester on the 15th day of September, 1868, for the revision of the list of voters for members of Parliament in the parliamentary borough of Manchester, before John Hosack, Esq., the Revising Barrister, Mary Abbott, appearing on the list published by the overseers of claimants to votes in the township of Manchester, was duly objected to by Matthew Chadwick, a person on the list of voters for the said parliamentary borough.

The name of the said Mary Abbott appeared upon the list of claimants in the following manner:—

Abbott, Mary	51, Edward-st.	House	51, Edward-st.
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It was admitted that the said Mary Abbott was a woman of the age of twenty-one years and unmarried, and that she had for twelve months previously to the last day of July, 1868, occupied a dwelling-house stated in the said claim with the said claim within the said township for such occupation, and that she had paid the rates for the relief of the poor assessed in respect of such dwelling-house before the 20th day of July last, and in other respects had complied with the requirements of the Registration Acts.

On behalf of the claimant it was contended that under the existing statutes the claimant was duly qualified and entitled to be registered as a voter and when registered to vote in the election of a member of Parliament, and that women for the purpose of being registered electors and voting in elections for members of Parliament are not subject to any legal incapacity.

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It was maintained, on the part of the objectors, that under the existing statutes the claimant was disqualified on account of her sex.

The revising barrister held that Mary Abbott, being a woman, was not entitled to be placed on the register, and her name was erased from the said list of claimants.

There were also struck out of the list the names of 5,346 whose names and qualifications are set forth in the schedule, and as the validity of their claims depends on the same point of law as that raised in the case of Mary Abbott the appeals were consolidated.

If the Court shall be of opinion that the said Mary Abbott is not entitled to have her name inserted in the list of voters for the said borough of Manchester then such names and the names referred to and set forth in the schedule above mentioned will remain erased; but if the Court shall be of opinion that the said Mary Abbott is entitled to have her name inserted in the said list of voters then her name and the said names referred to and set forth in the schedule are to be restored.

The following are the appellant's points for argument:—

1. That there is no disability at the common law whereby a *feme sole* otherwise duly qualified is prevented from voting in the election of a member or members of Parliament.

2. That the Representation of the People Act, 1867, section 3 confers the right to be registered, and when registered to vote for a member or members to serve in Parliament for a borough, on every man who is qualified as in such section is mentioned.

That in the 18 & 14 Vic. c. 21 (Lord Romilly's Act), it is declared by section 4, 'that in all Acts words importing the masculine gender shall be deemed and taken to include females unless the contrary is expressly provided.' That the words 'every man' denote the masculine gender, and that in the Representation of the People Act, 1867, the contrary is not expressly provided. Therefore, the words include 'every woman' and that a *feme sole* duly qualified according to the provisions of the said last mentioned Act is entitled to be registered, and when registered to vote for members of Parliament.

*Coleridge, Q. C.*, (*Dr Pankhurst* with him), for the appellant.—My main argument is this—women have this right at the common law, they have in ancient times exercised it, and no statute has ever taken it away. This is my main argument, and I shall enter upon it at once, though, of course, I also rely upon the construction of the word "man" in the Representation of the People Act, 1867. I shall, however, make that point last. Now, as to the position that at common law women have this right, and have in ancient times exercised it, the argument as to sex cannot be local; if, therefore, I can satisfy your Lordships that in counties the right was anciently exercised by women, that argument will avail for the present case, though it is the case of a borough. The first statute affecting the franchise in counties is 7 Hen. 4, c. 15. The words are, "From henceforth the elections of such knights shall be made in the form as followeth; (that is to say) at the next county to be holden after the delivery of the writ of the Par-

liament, proclamation shall be made in the full county of the day and place of the Parliament, and that all they that be there present, as well suitors duly summoned for the same cause as other, shall attend to the election of the knights for the Parliament, and then in the full county they shall proceed to the election freely and indifferently, notwithstanding any request or commandment to the contrary; and after that they be chosen, the names of the persons so chosen (be they present or absent) shall be written in an indenture under the seals of all them that did choose them, and tacked to the same writ of the Parliament, which indenture so sealed and tacked shall be holden for the sheriff's return of the said writ, touching the knights of the shires."

Now, here the suitors are those who are to have the franchise, and why not female suitors as well as male suitors? In 1 Hen. 5, c. 1, again, the words used are large enough to include both sexes, and I shall show as a matter of evidence, that women did in fact exercise the franchise. Now the elections for counties were held in the county court: 1 Bl. 178. What was this county court? It was a court where the freeholders were judges: 1 Reeves, 47. [*BOVILL, C. J.*—In Saxon times there is no mention of anything in their Parliaments except of wise men.] I am not speaking of the Witenagemote, but of the county court, to which clearly women as well as men must have been suitors, and it was in these county courts that the elections for the knights of shires were held. Now I contend that it is for my learned opponents to show that the county court held for the election of the knights of shires was different from the ordinary county court which tried causes. If the statute of Marlbridge, 52 Hen. 3, c. 10, be referred to, it will be seen that women attended the county court on some occasions, for the following passage is to excuse the attendance of nuns on certain occasions, namely, when members of Parliament were to be elected: "De turnis vicecomitum provisum est, ut necesse non habeant ibi venire archiepiscopi, episcopi, abbates, priores, comites, barones, nec aliqui viri religiosi, nec mulieres, nisi eorum presentia ob aliquam causam specialiter exigatur." Now if we go back to early parliamentary history, we shall find that the method of returning members was by indenture; the electors, or some of them, executing the indenture. Copies of such indentures are to be seen in *Prynne's Brevia Parliamentaria Rediviva*, 152, 158. I have also here certified copies of such indentures from the Record Office, one or two of which I refer to. They contain the names of women as returning members. The several dates of these returns are, 13 Hen. 4; 2 Hen. 5; 7 Edw. 6; 1 & 2 P. & M.; 2 & 3 P. & M. [*WILLES, J.*—In the last case, the woman is the only person who executes the indenture. That looks rather as if she was the returning officer, which she undoubtedly might be]. But that will not account for the case in 7 Edw. 6. There, the woman is mentioned in conjunction with others as sending up the members. [*BOVILL, C. J.*—The writ in the case in 2 & 3 P. & M., is directed to the lady. Would not that make her the returning officer?] It is not so in the case in 1 & 2 P. & M. Heywood, in his treatise on County Elections, 2nd ed, p. 255, says that it is usual to cite Coke's 4th Inst.

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against the right of women to vote. Now, I maintain that all the other exceptions in that passage (4 Inst. 5) are erroneous. For example, he says that clergymen labour under a legal incapacity to vote. [BOVILL, C. J.—Have you any example of clergymen voting before Lord Coke's time?] There is an archbishop in one of the writs I have cited. I am speaking without book, but I think there is no doubt that the clergy had given up their right to tax themselves separately before 1664 (3 H. C. H. 243, 10th ed.). I have the most unfeigned respect for Lord Coke's learning, but he had his weaknesses like other men, and one of them may have been a dislike of the clergy. He had no special reason to like women. Heywood goes on to say that notwithstanding my Lord Coke's opinion, women have as a fact in ancient times exercised the franchise, and in the note to p. 256 he gives at length a return for a borough by dame Dorothy Packington in the 14 Eliz. [BOVILL, C. J.—There is another passage in Heywood, at p. 255, in which he states what the law was in 1812, and that is against you.] In 2 Luders, 13, there is cited a burgess and freeman's roll of the 19 Eliz. for the borough of Lyme Regis on which the names of three women stand as burgesses and freemen. This is important, because this list would have been used to prove the right to vote at elections. [BOVILL, C. J.—Yes, but these entries of the women's names might have been for the mere purpose of securing the right of voting for their future husbands.] Supposing the right to have once existed, I now come to the question, has any statute ever taken it away? Because if not, mere non-user cannot have such an effect. The statute 8 Hen. 6, c. 7, is the well known statute restricting the right to vote in counties to forty-shilling freeholders. Assuming that up to this time a woman had the right to vote, what is there in this statute to deprive her of that right, if she but had a forty-shilling freehold? There is nothing. The word in the statute, which of course is in Norman-French, is "Gens." [BOVILL, C. J.—Have you read the title of the statute?] Yes. It is there "men." But the title is in English; it was probably added later on. You cannot rely on translation in such a case, and even though the heading were made in English at the time the statute was passed, yet it forms no part of the enactment. [WILLES, J.—Treby, J., says that the old statutes had no headings.] Now this statute being in restraint of the franchise, had it been in view to take it from women, that would have been expressly done. As to the subsequent statutes dealing with the franchise, while I do not contend that they specially refer to women, I yet maintain as to all of them, that they contain words large enough to include women. Such statutes are 10 Hen. 6 c. 2; 7 & 8 Will. 3, c. 4; 25; Anne c. 28; 2 Geo. 2, c. 24; 20 Geo. 3, c. 17. Next, as to the construction of the word "man" in the Representation of the People Act, 1867. There is a vast number of statutes in which the word "man" is used in the sense of both man and woman. Hence if no reason be shown in the present case why it should have a different meaning the more ordinary statutory sense must be given to it. Consider sections 18 and 19 of the Reform Act, 1832; 2 & 3 Will. 4, c. 45. If we compare the

phraseology of the sections I think we must conclude that where women already had votes as freeholders or burgesses they were meant to retain them, but that where fresh votes were conferred on copyholders, then women copyholders were not to acquire the right of voting, but men only were to do so. The late Reform Act, I contend, leaves the rights of women as compared with those of men where it found it. The great point which will doubtless be made on the other side is that for centuries no woman as a fact has voted. All that Lord Coke's opinion and the opinion of those lawyers who have followed his dictum amount to, is this, that for centuries the current of opinion has been against the right of women to vote, not throughout all the time, but at the particular time when the particular opinion was given. But it is hardly necessary to maintain that if the right once existed, non-user could not take it away. As to the application of Lord Romilly's Act, 18 & 14 Vict. c. 21, s. 4, to the interpretation of the word "man," as used in the Representation of the People Act, 1867, we must remember that Lord Romilly's Act was passed in 1850, some time after the Reform Act of 1832, and therefore at a time when the claims of women to vote had at least been heard of and discussed in modern times. Lord Romilly's Act may, therefore, be said to have been passed with a consciousness that it might very probably be employed before long to the very purpose to which I seek to apply it to-day. [KEATING, J.—Does it appear on the case that the appellant here claims under the franchise created by the Act of 1867?] [Mellish, Q. C.—It does not appear on the case, but it is the fact.] In *Olive v. Ingram*, 7 Mod. 263, Stra. 1114, the decision did not require the dictum upon which I rely; but in the judgment of Lee, C. J., a MS. case is cited in which the dictum was necessary. The case of *Olive v. Ingram* decides that a woman may be a sexton, and may vote for the election of a sexton. Now, I admit that of 7 Mod. is not of high authority. But the case was so decided, as we learn from Strange, who was then Solicitor-General, and in the case. [WILLES, J.—Have you any case where a woman, as the suitor to the county court, acted as judge?] I am not aware of one. Again, in *King v. Stubbs*, 2 T. R. 395, the question was whether a woman might be overseer of the poor. Now, the case itself does not carry the matter any further; but the reason given by the Court for its decision is most important. The decision is put on the ground of the phraseology used in the 43 Eliz.—"The only qualification required by 43 Eliz. is that they shall be *substantial householders*; it has no reference to sex." 2 T. R. 406. Again, in *R. v. Crosthwaite*, 17 Ir. C. L. Rep. 157, 463, women were held entitled to vote for a town commissioner, as being included in the description "every person of full age who, &c.," contained in a certain section of a certain Act. That case was, it is true, reversed on appeal to the Irish Exchequer Chamber. But of the entire Bench taken together it will be seen that a majority were in favour of the original decision. If the present question be regarded as one of constitutional law, and it is difficult to see how that can be avoided, we must remember that all great constitutional writers make English free-

dom to depend to a great extent on the connections between the right to vote and the liability to taxation. Why are women to form a striking and an unfair exception to this rule?

[The learned counsel then proceeded to discuss the fitness of women for the exercise of political rights; but as in this part of his argument he did not introduce any additional legal matter, it is not here given.]

*Mellish, Q. C. (R. G. Williams with him), for the respondent.*—This is a case where the lady claims to vote for the borough of Manchester. That borough was created by the Reform Act of 1832. Now, my learned friend admits that the phraseology of that Act cannot be strained so as to include women among the electors to whom the franchise is given for the first time by that Act. Therefore, so far as the borough of Manchester is concerned, and, therefore, so far as the present case is concerned, the contention of my friend must rest on the construction of the Representation of the People Act of 1867.

Now it is admitted that, when that Act was passed, the common opinion was that women had not the right to vote, and therefore that Act was passed in view of that opinion. But I contend that the opinion which has prevailed for so long on this subject, both among lawyers and among ordinary persons, is strictly in accordance with the common law. In the first place, this common opinion is proof of what the common law is, in the absence of any proof to the contrary. Of course there may exist strong evidence which will rebut this presumption, but I submit that no such evidence has been adduced to-day by my friend.

There are two questions as to section 3 of the Act of 1867. First, does "man" include woman; and, secondly, is sex an "incapacity"? I can't see that, without Lord Romilly's Act, my friend has any case, though he seemed to think but poorly of the assistance he was to derive from that Act. Now the Act to be construed is not Lord Romilly's Act, but the Act of 1867. If your Lordships can gather in any way permitted to the judicial mind that the Legislature did not intend to include women by the Act of 1867 your conclusion cannot be affected by any difficulties of construction consequent on Lord Romilly's Act. Now, if the Legislature had intended to make this change, would they have done it in this way, this very vague and uncertain way. The 56th and 59th sections of the Act of 1867 throw some light on this point. By these sections, the two Acts of 1832 and 1867 are to be construed together. How can we possibly read these Acts together if Lord Romilly's Act, which was passed in 1850, is to be applied to interpret the one Act and not the other.

The word "man" no doubt itself admits of two constructions (1) in opposition to angels and beasts, and (2) in opposition to infants and women. If it is used in the latter sense in section 3, the contention is at an end. Surely that is what it does mean. If you take it in connection with the Reform Act of 1832 how could it mean anything else. By "male person" in the Act of 1832 the Legislature clearly meant this, and it must therefore have meant the same in section 3. For example, section 27 of the Act of 1832 applies to males only, but to males in

warehouses, &c. Whereas the Act of 1867 applies to dwelling-houses only. So, if section 3 were held to include women, we should have an absurd inequality; sex would in some instances operate as an incapacity, and in some instances it would not. Now clearly the Legislature could never have deliberately intended this. Consider the Mutiny Act, 30 & 31 Vict. c. 152. The expression there is that so many thousand "men" shall be raised. Would that authorize a recruiting serjeant to enlist women? I submit not. Yet this is since Lord Romilly's Act.

But if we leave the consideration of the late Act, and examine what the state of the law was anterior to its passing, I must say I rely equally with my friend on the phraseology of the early statutes. He says truly that the words in those statutes are very general, and in each case capable of including women as well as men. Quite so, but as a matter of fact such a construction as that contended for by my friend never was put on any of those statutes, as is sufficiently proved by the uniform practice that women did not vote at elections as far back as legal memory goes. For I contend that my friend has made out no case that they ever have voted in ancient times, and to that point I am coming in a moment. The statute 8 Hen. 6, c. 7, was a restraining statute. But I admit that that statute did not take away any franchise from women. If women had a right to vote before that statute they have it still if they are forty-shilling freeholders. And as to the latter statutes I equally concede to my friend that no rights were taken from women by them, for they are not disabling Acts at all. Now, I submit that whatever may have been the correctness of the opinion that women have not the right to vote at elections, at any rate all the authorities show that in point of fact from the time of Coke to the present day women did not vote. What is the evidence with which my friend meets the presumption raised by this concurrent testimony? How does he seek to rebut the great opinion of Lord Coke? His authorities are very ambiguous. As to women being suitors to the county court, the fact of their being bound to come to the county court does not prove that they went there as suitors. Others than suitors we know were bound to go. The extracts from Prynne only show that in four or five cases women seemed to have signed the indentures. Now, if it be as my friend contends we have a married woman appointing an attorney, and that attorney voting for her, as will appear on looking at the returns. In these cases the women were probably the patrons of the borough, and in one case it is not certain that she was not the returning officer. You have thus three or four ambiguous signatures against the uniform usage and opinion of the last 300 years. It does not appear, indeed, except in the case where the woman's was the only signature, that the returns were disputed, and in that case the return was held bad. There is nothing to show that superfluous signatures would vitiate the return. In the case of *Olive v. Ingram* the dicta are more for me than they are against me, as will be seen by reading the judgment. Lee, C. J., it is true, gives contradictory opinions in different parts of his judgment, but in the conclusion he is in my favour. Therefore, in that case the authority of

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the judges and the ground of the decision are in my favour. How, then, can you, in such a report as 7 Mod., attach any importance to the alleged production of a MS. case.

There is a unanimous decision of the Scotch Court of Session of October 30, 1868, in my favour though Lord Romilly's Act applies to Scotland. As to my friend's observations on the fitness of women for the franchise, I wholly decline to follow him into that question.

*Coleridge Q. C.*, in reply.

*Cur. adv. vult.*

The judgments were delivered on November 9. Those of BYLES and KEATING, JJ., were written, and are given here *verbatim*. Those of his Lordship and of WILLES J., are taken from the shorthand writer's notes of what they said

[We have only space for the judgment of the Chief Justice.—ED. L. J.]

BOVILL, C. J.—It is quite unnecessary to consider the question, whether it is desirable that women should possess the franchise of voting at the elections of members of Parliament. What we have to determine is, whether by law they now possess that right. In the present case, it is agreed, the right of the appellant to be placed on the list of voters for the borough of Manchester must depend on the construction to be placed on the Representation of the People Act, 1867. Under that statute two questions arise, one whether women are included under the words "every man," and the other, whether women are subject to legal incapacity. If women are not included in the terms of the Act, or are so incapacitated, our judgment must be in favour of the respondent.

On the question of whether they are incapacitated Mr. Coleridge, on the part of the appellant, contended that women had a right to the franchise at common law, that nothing has taken it away from them, and that they were therefore not incapacitated from voting. Indeed, in the first instance, I rather understood him to contend that the present appellant was entitled to the franchise as a common law right, and he fully argued that question.

The appellant has failed to produce before us any reported decision of any Court in favour of the right of women to the exercise of the franchise, in voting for members of Parliament, with the exception of the notes of cases which are referred to in 7 Mod. Mr. Coleridge was obliged to admit that for several hundred years no instance is to be found of the exercise by women of any such right. This alone is sufficient to raise a very strong presumption against the existence of the right in point of law.

It is true that a few instances have been brought before us where in ancient times—namely, in the reigns of Henry II., Henry V., and Edward VI., women appear to have been parties to returns of members of Parliament; and, possibly, other instances may be found in early times, not only of women having voted, but also of their having assisted in the deliberations of the Legislature, and, indeed, it is mentioned by Selden in his *England's Epinomis*, c. 2, s. 19, that they did so. But these instances are of comparatively little weight as opposed to uninterrupted usage to the contrary for several cen-

turies. What has been commonly received and acquiesced in as the law, raises a strong presumption of what the law is. At least those who question it have the burden of proving that it is not what it has been so understood to be.

The statute 52 Hen. 8, c. 10, in relieving women from attending at the sheriff's tourn does not prove that they were entitled to or did vote at the elections. Neither is this shown by the names of women being included in the roll of burgesses and freemen of the borough of Lyme Regis as mentioned in 2 Luters. The records that were produced of the time of Philip and Mary show that dame Elizabeth Copely was a party to an indenture as returning officer, and that may possibly be the explanation of the previous return in the reign of Edward VI.

The same observation applies to the case of Lady Packington joining in an election for Aylesbury, as appears from 7 Mod. 268. The precept was directed to her as lady of the manor to return two members of Parliament. With regard to the two cases mentioned in the report of *Olive v. Ingram*, 7 Mod. 263, they appear to have been cited from a MS. by Hakewell. The statement of them varies in different parts of the report, and though the argument was several times adjourned it does not appear that anything satisfactory was discovered respecting them. They are not even mentioned in the report of the same case by Sir John Strange, and I think that very little weight is to be attached to them. If there was any such decision—and one of the cases is said to have been decided in 14 James I.—it is difficult to understand why no further notice or trace of it is to be found or why it should not have been acted upon.

At this distance of time we have not the means of ascertaining accurately the particulars of those cases, or under what circumstances the returns produced to us were made, or whether any question was ever raised respecting them. The decisions as to what offices women may hold, and whether they come within the description of particular statutes does not materially affect us in this case. On the other hand Lord Coke, 4 Inst. 5, treats it as clear law, in the time of James I., that women were incapacitated from voting, and in the case of *Olive v. Ingram* (temp. 12 Geo. 2) the majority at least of the judges, notwithstanding the two cases referred to, seem to have been of the same opinion.

In the work (published in 1812) of Mr. Sergeant Heywood, who was well acquainted with election law, women are classed among those who are incapacitated from voting. The same view has been accepted by Mr. Hallam and others in modern times, and was to some extent recognised in the Act of 1832, by the Legislature when it conferred the franchise on "male persons."

There can be no doubt that at the time of the passing of the Act of 1867 the common understanding both of lawyers and laymen was that women were incapacitated from voting, and the Legislature must, I think, be presumed to have acted under that impression.

The 56th section of the Act of 1867 also expressly preserves all laws, customs, and enactment then in force.

Mr. Coleridge has very forcibly contended that if women were ever entitled to the franchise

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nothing has occurred to take it away. But the fact of its not having been asserted or acted upon for many centuries raises a strong presumption against its having legally existed, and considering that no reported decision or authority can be produced in favour of the right, that there are the opinions against it to which I have referred, and that there has been such long and uninterrupted usage to the contrary, I have come to the conclusion that there is no such right, and that women are legally incapacitated from voting within the meaning of section 3 of the Act of 1867.

Assuming, however, that the claimant was not legally incapacitated within the meaning of the late statute, the question then would arise, whether the franchise has been conferred by that Act and by force of the provisions of Lord Romilly's Act? This depends upon the construction to be placed upon the language of the Legislature in section 3 of the Act of 1867. It enacts that every "man," with certain qualifications, shall be entitled to the franchise.

In the Act of the 13 & 14 Vict. c. 21, s. 4, it is enacted that all words signifying the masculine gender shall be taken to include females, the singular shall include the plural, and the plural the singular, unless the contrary as to the gender or number is expressly provided. Now, in construing the third section of the Act of 1867 regard must be had to the whole of the enactment with a view to ascertaining whether the word "man" is there used in the sense of a person, or is equivalent to the expression "male."

By the 56th section of the Act of 1867 it is provided that the franchises conferred by the Act shall be "in addition to and not in substitution for, &c., &c."

By the 59th section it is enacted that the Act, so far as is consistent with the tenor thereof, is to be construed as one with the enactments for the time being in force relating to the Representation of the People and with the Registration Acts. By the Reform Act of 1832 the occupation franchise in boroughs is expressly given to "male persons" who shall be qualified as therein mentioned.

By section 33 of the Act of 1832 it is enacted, "That no person shall be entitled to vote in the election of a member or members to serve in any future Parliament for any city or borough, save and except in respect of some right conferred by this Act, or as a burgess and freeman, or as a freeman and liveryman, or in the case of a city or town being a county of itself, as a freeholder or burge tenant as hereinbefore mentioned."

It is quite clear that women would not become entitled to the franchise under that Act. Now the two Acts are to be construed as one, and therefore we should endeavour, as far as possible, to put such a construction upon the latter Act as will make it consistent with the provisions of the former statute.

There is no doubt that in many statutes "men" may be properly held to include "women," whilst in others it would be ridiculous to suppose that the word was used in any other sense than as designating the male sex. We must look at the subject-matter, and at the general scope of the provisions of the later Act, as well as at its language, in order to ascertain the meaning of

the Legislature. I do not think, from the language of the Act, that there was any intention to alter the description of the persons who were to vote. I should rather conclude that the object was to deal with their qualifications. If so important an alteration of the personal qualification was intended to be made as to extend the franchise to women who did not then enjoy it, and in fact were excluded from it by the terms of the former Act, I can hardly suppose that the Legislature would have made it by using the term "man." Indeed, in the very next Act, where it was intended to extend the Franchise Act, females are expressly included.

The conclusion at which I have arrived is that the Legislature used the word "man" in the same sense as "male person" in the former Act, and that the word was intentionally used in order to designate expressly the male sex, and that it amounts to an express enactment and provision that every man, as distinguished from every woman possessing the qualifications, was to have the franchise.

In that view Lord Romilly's Act does not apply to this case, and does not extend the meaning of the word "man" so as to include women. On this part of the case the decision of the Scotch Court of Session is also in point, and in that decision I entirely concur.

On both grounds, therefore, first, that women were legally incapacitated for voting for members of Parliament; and, secondly, that the section is limited to men and does not extend to women, I think that women are not entitled to the franchise, and that the decision of the revising barrister must be confirmed in this case and in the other cases which depend upon this case. But it is not a case in which costs should be given.

## CHANCERY.

BRIANT V. TIBBUT.

*Practice*—Leave to move to vary chief clerk's certificate, after expiration of time for moving—15 & 16 Vict. c. 89, s. 39.

Leave given to move to vary chief clerk's certificate, although application was not made until after the expiration of the eight days allowed by the order; the omission to make the application having arisen from pressure of business, and mistake as to time on the part of solicitor. [17 W. R. 274, Jan. 15, 1869.]

This was an application on behalf of the plaintiff in the cause for leave to move to vary the chief clerk's certificate notwithstanding eight clear days had elapsed since the filing thereof.

The certificate was dated on the 17th of June, and filed on the 23rd of June last.

On the 22nd of June the plaintiff's solicitor received a report from an engineer relating to the finding of the chief clerk. The solicitor had a conference with the plaintiff on the same day, and received instructions to take the opinion of counsel. The solicitor, immediately after such conference, went to counsel's chambers, but not being able to meet with him, left the papers for his advice.

The solicitor, on the 29th of June, received a message from counsel asking for an interview, but was not able, in consequence of important business out of town, to see counsel until the 1st of July, when, after a long conference, counsel advised proceedings to be taken to vary the cer-

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tificate. The solicitor then found that the time for making the application to vary the certificate expired on that day, and leaving the chambers of counsel at about 3 30 p.m. he immediately proceeded to the chambers of Vice-Chancellor Giffard, to whose court the cause was at that time attached, and arrived there a few minutes afterwards, but found the chambers closed.

His Honour received a communication from the chambers of Vice-Chancellor Giffard to the effect that they were never closed before 4 p.m., even though all business was completed.

The following cases were cited:—*Ware v. Watson*, 4 W. R. 86, 7 De G. M. & G. 739; *Howell v. Keightly*, 4 W. R. 477, 8 De G. M. & G. 325; *Ashton v. Wood*, 5 W. R. 271, 8 De G. M. & G. 698.

MALINS, V. C., was satisfied that the solicitor arrived at the chambers of the Vice-Chancellor after 4 p.m., but on the balance of convenience it was right to give the leave asked, for if the plaintiff was right on the merits he ought to succeed; if he were wrong the Court would so decide. To refuse the application would be too severe on the plaintiff. He must, however, pay the costs of the application.

## UNITED STATES REPORTS.

### SUPREME COURT OF PENNSYLVANIA.

#### LORIN PALMER v. GEORGE S. HARRIS.

A trade-mark having upon it a false statement which did not, and could not produce any effect upon the purchasers of the article, is nevertheless so tainted by the falsehood that equity refuses to protect it.

A trade-mark for a brand of segars, manufactured in New York, had upon it in Spanish words, which interpreted into English, mean: "Factory of segars from the best plantations de la Vuelta Abajo, calle del Agua, Habana." Equity refused, on the ground of the falsehood, to enjoin a printer from counterfeiting the device, and supplying the trade with his imitations.

This was an appeal from a decree of the Court of Common Pleas of Philadelphia, which refused to grant an injunction to restrain Harris from counterfeiting Palmer's trade-mark.

The facts were that Palmer, a dealer in segars, designed a label for a particular brand which he manufactured, and which had acquired an extensive popularity in the United States as the "Golden Crown." The label contained a golden crown, surrounded by a green wreath, and underneath this the words,

"FABRICA DE TABACOS DE LAS MEJORES VEGAS,  
DE LA VUELTA ABAJO,  
CALLE DEL AGUA NO. 73, HABANA."

Harris, the defendant, printed the imitation of the design, containing the same words, and supplied dealers in the segar trade with the counterfeits, and thus enabled them, by attaching the imitation to their own segars, to avail themselves of the reputation which Palmer had acquired, and deprive him of the exclusive use and benefit of his trade-mark. Palmer's design was copyrighted under the Act of Congress, February 3, 1831, 4 Stats. 436, sec. 1. The imitation was not denied, but the defence was, that the segars being made in New York, the label contained a

false and fraudulent representation, which equity would not protect. The court below dismissed the bill.

*James Parsons* for the appellant.—A trade-mark is a species of property. *Bradley v. Norton*, 38 Conn. 157: and entitled to protection (*Colladay v. Baird*, 4 Phila. 139; *Burnett v. Phalon*, 11 Tiff. (N. Y.) s. c. 3 Tr. App. 167, by injunction against one who imitates the trade-mark so nearly that a purchaser might be misled; a substantial similarity is sufficient; *Bradley v. Norton*, *supra*; *Coats v. Holbrook*, 2 Sand. Ch. 526, and cases cited; *Taylor v. Carpenter*, Id. 603, s. c. in error 611; *Partridge v. Heuck*, Id. 622; *Williams v. Johnson*, 2 Bosw. 1; *Stokes v. Landgraff*, 17 Barb. 608; *Anoskeag Manufacturing Co. v. Spear*, 2 Sand. S. C. 599; *Wolfe v. Gould*, 18 How. Pr. R.; *Clark v. Clark*, 25 Barb. 76; *Brooklyn White Lead Co. v. Masury*, Id. 416; *Walton v. Crowley*, 3 Blatch. C. C. 440.

The assertions on the label are in a foreign language, and the law presumes, until the contrary is proved, that they were not understood, at least when to assume that the statements were comprehended would charge the person who uttered them with liability: 2 Starkie on Slander, 52; Cook on Defamation, pp. 14, 87.

If the words were understood, positive knowledge of what he was buying was nevertheless brought home to every purchaser, and their effect neutralized by, 1st, Palmer's public declaration that he was a citizen or permanent resident of the United States, and consequently that the segars which he manufactured were a domestic product, involved in taking out a copyright of his design: *Casey v. Collier*, 56 Niles' Reg. 262, Judge Betts, 1839; *Keene v. Wheatley*, 9 Am. L. R. 45, Judge Cadwalader, 1860.

2nd. The internal revenue and customs regulations. The internal revenue stamp on the box of segars states the kind, quantity, date of inspection, collection district they are manufactured in, and the inspector's name: Act of Congress, July 13th, 1866; Boutwell's Manual, p. 51, sec. 91. And the law imposes upon the purchaser, under a penalty, the duty of ascertaining that the inspection has been made: Id. sec. 92.

3rd. The requirement, which excludes the possibility of mistake, that imported segars must be inspected and stamped before removal from public store or bonded warehouse: Act of Congress, July 28th 1866, Stats at Large, 1865-6, p. 828.

The assertions, therefore, are innocent in the effect which they produce upon the public. In *Elleston v. Vick*, an article was described as "patented," which signified that it was protected by a patent, though the patent had, in fact, expired. Vice-Chancellor Wood drew the inference that the dealers in the trade knew that the term had expired, and were not injured by the falsehood; he did not enter into and canvass the motives which induced the plaintiff to assert the untruth: 11 Hare 78, 1838. And in *Dale v. Smithson*, the plaintiff put upon his trade-mark a fictitious name as that of the manufacturer of the article. The court decided that, as the public was not in fact deceived, the plaintiff was entitled to their protection: 12 Abbott Pr. R. 237. Until a purchaser has been deceived, no act has been done which gives the law a pretext to interpose

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A naked intention to deceive is not a ground for legal action of any kind—least of all for the infliction of a penalty or forfeiture. Intention by itself, unembodied in an act, does not come within the purview of jurisprudence; it is only when coupled with an act that it becomes an important element in determining its character: 2 Austin's Jurisprudence 147; Lord Mansfield, *R. v. Scofield*, Cald 397; *R. v. Higgins*, 2 East 5; Lindley, Juris. xxx., 2; *Smith v. Bowler*, Disney, Rep. 520-26.

Equity lends its aid to make a legal right more effectual: *Farina v. Silverlock*, 6 DeG. M. & G. 214; s. c. 39 E. L. & E. 514, 1856. If the title is contested, equity suspends its aid until the legal right is established: *Pidding v. How*, 8 Simons 477; *Singleton v. Bolton*, 3 Doug. 293; *Perry v. Truefit*, 6 Beavan 66. This is the practice; under liberty granted by Vice-Chancellor Wigram, *Rodgers v. Nowill*, was tried in 1848: 5 M. G. & Sc. 109.

A test case at law by the purchaser against the proprietor would require a false representation by the proprietor, his knowledge of its falsity, ignorance on the part of the purchaser that the representation was false, and his acting upon it in the belief that it was true, and injury resulting from such action: *Sykes v. Sykes*, 3 B. & C. 541, 1824; s. c. 5 D. & R. 292; *Singleton v. Bolton*, *supra*; *Crayshaw v. Thompson*, 4 M. & G. 857, 1842; *Rodgers v. Nowill*, *supra*; *Behn v. Kemble*, 7 C. B. N. S. 260; Eden on Injunction, by Waterman, 25, note 1.

There can be no deception until somebody is deceived: 1 Starkie on Evidence 874; Adam's Equity 176 and note; Story's Equity, sec. 191, 202-3; Broom's Maxims 353.

When the legal title is established at law, as in *Stewart v. Smithson*, 1 Hilt. 119, equity enforces the right: *Dale v. Smithson*, *supra*; which is vested, and can be forfeited only on legal ground. It is better fortified than the right to a contract which equity rescinds only when an action of deceit could be maintained at law; Sugden on Property, in H. of L. 597-8-9, 406-8. 64 L. L. 398-9; Sugden on Vendors 180, ch. 5, sec. 111, pl. 41; 204, ch. 5, sec. 5, pl. 3; Fry on Specific Performance, ch. xii., p. 191; xiii., 206, L. L. 100.

The result of the broad proposition that a false statement vitiates the title would be, 1st. To forfeit in this kind of property, though in no other, a man's title, for the slightest taint of fraud.

2nd. To give the benefit of this penalty to a confessed pirate, in spite of the Act March 8th, 1856, Pamph. L. 514, Pard. Dig. 1155.

3rd. To put outside the pale of law property which has at any time been falsely represented in the market, and thus the object of law, to preserve society from internal disorganization, is, to the extent of this excluded property, frustrated.

*Theodore Cuyler*, for appellee.—Protection is asked from a court of equity for a tradesman's label which is confessedly false, and both calculated and intended to deceive and mislead the public.

It is gravely argued that this label, however intended, does not in fact deceive, because of the words obscurely printed below, "Entered according to the Act of Congress."

So, too, it is said the law requires an imported article to have upon the boxes certain marks of inspection, the absence of which from these boxes shows the label is untrue, and prevents it from deceiving the purchaser.

But the motive is still present, and the fact too, even if this be so—that the unwary and ignorant are, in fact, deceived and intended to be deceived.

The authorities upon this question are very clear and well settled.

Mr. Daniels, speaking of trade-marks, says: "With respect to these cases, it may lastly be observed, that the remedy given in equity is discretionary, and will be withheld if there has been any improper conduct on the part of the plaintiff. On this principle the court has refused to grant an injunction, in the first instance, where the plaintiff has made false representations to the public concerning the article which he seeks to protect;" 8 Daniel's Ch. Practice, p. 1755; and again, p. 1754: "He cannot, therefore, be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."

2 Story's Eq. sec. 951; *Perry v. Truefit*, 6 Beavan 66; *Millington v. Fox*, 3 M. & K. 388; *Clark v. Freeman*, 11 Beav. 112; *Hogg v. Kirby*, 8 Ves. 226; *Walcott v. Walker*, 7 Id. 1; *Pidding v. How*, 8 Simons 477.

[Mr. Justice READ.—There is a recent case decided upon this point by the House of Lords, which has not been mentioned, *The Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. 523.]

In *Fowle v. Spear*, 7 Penna. Law Journal 176, the United States Circuit Court refused to protect by injunction the manufacturers of quack medicines. A court of equity will not protect worthless articles, or countenance fraud or immorality.

*Parsons*, in reply.—*The Leather Cloth Co. v. The American Leather Cloth Co.*, cited by Mr. Justice Read, was decided upon the point of similarity; the resemblance was not sufficiently close to make the defendants' stamp a colorable imitation.

There is no doubt that courts of equity refuse to protect quack medicines and noxious drugs: *Woodruff v. Smith*, 48 Barb. 438; but in such cases no attempt is or could be made to anticipate and counteract the evil effect; the antidote does not accompany the poison. But in this case it is demonstrated that the assertion never in a single instance produced any effect.

The opinion of the court was delivered by

SHARSWOOD, J.—The plaintiff, according to the statements of his bill, is the manufacturer of a cigar, known as the "Golden Crown," and he has devised a trade-mark, which he uses in its sale. He charges that the defendant, who is a printer by trade, has counterfeited this mark, and sells copies of it to persons engaged in the manufacture and sale of cigars, by whom they are used to his damage. The answer of the defendant admits these allegations; but sets up as a ground for the non-interference of the court, that the articles thus sold by the plaintiff were manufactured in the city of New York, and that the trade-mark in question contains upon it the declaration that they are the product of a "factory of cigars from the best plantations de la Vuel."



## U. S. Rep.] PALMER V. HARRIS—DIGEST OF RECENT DECISIONS, QUEBEC.

Abajo, Calle del Agua, Habana." The case having been heard on bill and answer, the bill was dismissed with costs.

The maxim which is generally expressed, "He who comes into equity must come with clean hands," Snell's Principles 33, but sometimes in stronger language, "He that hath committed iniquity shall not have equity," Francis' Maxims 5, has been often applied to bills to restrain by injunction the counterfeiting of trade-marks. The ground on which the jurisdiction of equity in such cases is rested, is the promotion of honesty and fair dealing, because no one has a right to sell his own goods as the goods of another: *Croft v. Day*, 7 Beavan, 232. "It is perfectly manifest," said Lord Langdale, "that to do this is a fraud, and a very gross fraud." It is plain that there is no class of cases to which the maxim referred to can be more properly applied. The party who attempts to deceive the public by the use of a trade-mark, which contains on its face a falsehood as to the place where his goods are manufactured, in order to have the benefit of the reputation which such goods have acquired in the market, is guilty of the same fraud of which he complains in the defendant. He certainly can have no claim to the extraordinary interposition of a tribunal, constituted to administer equity, for the purpose of securing to him the profits arising from his fraudulent act. Thus in *Pidding v. How*, Simons 477, the plaintiff had made a new sort of mixed tea and sold it under the name of "Howqua's Mixture;" but as he had made false statements as to the teas of which his mixture was composed, and as to the mode in which they were procured, the court refused an injunction: Vice-Chancellor Shadwell, remarking, "It is a clear rule laid down by courts of equity not to extend their protection to a person whose case is not founded in truth." In *Flavel v. Harrison*, 10 Hare, 467, an injunction was refused, when an article was sold by the name of Flavel's Patent Kitchener, for which there never had been a patent. In *Leather Cloth Company v. American Leather Cloth Company*, 11 House of Lords Cases 533, though decided on the ground that the mark used by the defendants was substantially different from that of the plaintiffs, yet it may be fairly inferred from all the opinions that, if necessary, the decree of Lord Chancellor Westbury would have been affirmed on the broader ground. Thus, a company which had gained reputation by a particular manufacture, on discontinuing their business, transferred their stamp or trade-mark, which indicated them as the manufacturers, to other parties; and it was the opinion expressed that such assignees would not be protected in equity in the use of that mark on goods manufactured by themselves. "So," said Lord Cranworth, "in the cases of bottles or casks of wine stamped as being the growth of a celebrated vineyard, or of cheese marked as the produce of a famous dairy, or of hops stamped as coming from a well-known hop-garden in Kent or Surrey, no protection would be given to the sellers of such goods, if they were not really the produce of the place from which they purported to come." It is contended, however, that this case is different, because there were marks or words used with these labels inconsistent with the idea that they were held forth as manufactured in Havana. On

the label is printed, "Entered according to Act of Congress, A.D. 1858, by Lorin Palmer, in the Clerk's Office of the Southern District of New York." Apart from the fact that this is in such very small type, and so abbreviated, that it would probably escape the observation of every one whose attention was not specially directed to it, a circumstance which rather strengthens the evidence of an intention to mislead the public, what is there in the fact that the design or engraving had been copyrighted in the United States, inconsistent with the declaration that the cigars, contained in the box, were manufactured in Havana of Cuban tobacco? But, again, it is said that the United States internal revenue stamp would at once undeceive the purchaser, there being a difference between the stamp used for articles imported and for those of domestic manufacture. Few persons would stop to notice this difference: and besides, as it is alleged, the trade-mark is pasted on the inside of the lid, and when the box is open for the purpose of retailing, the trade-mark is brought directly in the view of persons wishing to purchase, and the revenue stamp is not seen unless the lid is turned down, and the box examined on the outside. It is contended, further, that the falsehood is in a foreign language, of which it is to be presumed that the plaintiff's customers are ignorant. Yet there is certainly enough to convey to every one, who can read, that the cigars are from "Havana." It is true, that when a slander is uttered in a foreign tongue it is necessary, in an action for damage, to prove that the hearers understood the language; for it will not be presumed that, being ignorant of the meaning of the words, they afterwards repeated them to those who understood them: 2 Starkie on Slander 52; but there is no such rule in an action for libel in a foreign language, for *litera scripta manet*; that may be read and explained by those who do, to those who do not understand it. The case of a written or printed libel has a much closer analogy to the point before us than that of spoken slander. But above all this, it is not necessary that any one person has been actually deceived or defrauded; it is enough that it is a misrepresentation, calculated to have that effect on the unwary and unsuspicious.

Decree affirmed, and appeal dismissed at the costs of the appellant.—*Am. Law Register*.

## NOTES OF RECENT DECISIONS IN PROVINCE OF QUEBEC.

### BANK AGENT—GUARANTEE SOCIETY.

*Held*, that the allowing by a Bank Manager of overdrafts without security, but (in the opinion of the Court) under a discretionary power possessed by him, and without fraudulent intent, is not an irregularity within the meaning of a policy guaranteeing the Bank against such loss as might be occasioned to the Bank by the want of integrity, honesty, fidel-

## GENERAL CORRESPONDENCE—REVIEW.

ity, or by the negligence, defaults or irregularities of the manager.—*The Bank of Toronto v. The European Assurance Society*, 13 L. C. Jurist, 63.

## CORPORATION.

*Held*, That a city corporation may be sued in damages for assaults committed by its servants, such as policemen, when the assaults are approved and attempted to be justified by the Corporation.—*Doolan v. The Corporation of Montreal*, 13 L. C. Jurist, 71.

## INSOLVENCY.

*Held*, that an insolvent may validly make a voluntary assignment to any official assignee, whether resident or not within the county wherein such insolvent has his place of business.—*Brown v. Douglas*, 13 L. C. Jurist, 29.

## INSOLVENCY—SECRETION.

*Held* (TORRANCE, J., dissenting). 1st. Where a trading partnership obtained advances from a bank under an agreement, that the moneys derived from the sale of hemlock bark extract, manufactured by them, should go in liquidation of the debt to the bank, and the said partnership, while in a state of insolvency and largely indebted to the bank, sold a quantity of bark extract, and applied the proceeds to the payment of other debts; that such act did not amount to secretion.

2nd. That there cannot be constructive secretion.—*The Quebec Bank v. Steers et al.*, 13 L. C. Jurist 75.

## GENERAL CORRESPONDENCE.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Are clerks of the Superior Courts—or deputies—or clerks of the County Courts, authorised in issuing subpoenas in cases depending in their courts, without the production and filing of a præcipe by the party making the application.

Yours, &c.,

Chatham, April 6, 1869.

ONE, &c.

[The practice in the Crown offices in Toronto is not to require præcipes for the issue of subpoenas. We presume the same rule should be observed in the outer counties.—*Eds. L. J.*]

## REVIEWS.

THE LAW OF RAILWAY COMPANIES, COMPRISING THE COMPANIES CLAUSES, THE LANDS CLAUSES, THE RAILWAY CLAUSES CONSOLIDATION ACTS, THE RAILWAY COMPANIES ACTS, 1867, AND THE REGULATION OF RAILWAYS ACT, 1868. With notes of all the decided cases on these Acts, &c. By Hy. Godefroi, of Lincoln's Inn, and John Shortt, of the Middle Temple, Barristers-at-Law. London: Stevens & Haques, Law Booksellers and Publishers, 11 Bell Yard, Temple Bar, 1869.

We have to thank the publishers for an early copy of this work. The editors appear to have acquitted themselves well. The notes are terse and yet sufficiently full to give the desired information as to judicial interpretation of the sections annotated. Annotated editions of important acts of Parliament are of great service to the profession, and for purposes of ready reference are preferable to treatises. The aim of an editor of an annotated edition of a statute should be to avoid loading his notes with details as to facts. What the reader of such a work wants is the marrow of the decision, and that expressed in the fewest possible words. The editors of the work before us have not been unmindful of this requisite. By observing it they have succeeded in presenting to the profession a great body of law on subjects of very general importance in a portable form, considering that our Railway Clauses Consolidation Act is in great part taken from the English Act, the value of this work to all interested in Canadian railways is obvious; with many railways constructed, others in course of construction, and yet others projected, there is already much "railway litigation" among us. The duties and obligations of railway companies to "adjoining proprietors," and the public are not at all times easily ascertained or easily defined. The consequence is daily increasing litigation, and daily increasing necessity for a work like that now before us. Its cost is so moderate as to place it within the reach of all. The facility it affords for reference to decided cases is so great that the possessor of it must save time, and "time saved" to a man of good practice in our profession is "money made." The index is truly exhaustive. By means of succinct notes and an elaborate index no real

## REVIEWS—ITEMS.

difficulty can be experienced in finding that which is sought. The volume proper contains no less than 552 pages. Added to this is an appendix, 384 pages, containing all material acts relating to railways and the standing orders of the Houses of Lords and Commons, and the index. The latter alone is so comprehensive as to embrace 80 pages. The mechanical execution of the work by the law publishers, under whose auspices the work is issued is all that could be expected from a firm so well known and so eminent as Messrs. Stevenson & Hagues. Their agents in Toronto are Adams, Stevens & Co. and Messrs. W. C. Chewett & Co. Orders left with either firm will receive prompt attention.

**MR. DICKENS AND THE PEERAGE.**—It is the privilege of literary men to blunder about legal matters, but Mr. Charles Dickens has abused the privilege. In his speech at the Liverpool banquet he vindicated himself from the charge of disparaging the House of Lords, and explained to his audience that he enjoyed the friendship of many members of that House, not least among whom was *Lord Chief Justice Cockburn*. Now Mr. Charles Dickens has known Sir Alexander Cockburn for many years, and even if for a portion of that time he had imagined that the Chief Justice was a peer, we should have supposed that the truth might have dawned on him in December last, when his illustrious friend was offered and declined a peerage. Up to the delivery of the Liverpool speech we had believed that the celebrated '*Pandects of the Benares*' could not be eclipsed; but anything is possible when a *littérateur* of the loftiest pretensions does not know whether the man 'whom he loves more than any other in England' is a commoner or a peer.—*Law Journal*.

The law is preserved in reports, of which there are many thousand volumes; so that any one in ignorance of the law has only to purchase or borrow these, compare the different decisions, and apply them all to his own case, when he will either be right, or have the happiness of correcting the law by a fresh decision telling him that he is wrong.—*Comic Blackstone*.

What an attorney is, everybody who has got an attorney will no doubt be aware, but those who are ignorant on the point may feel assured that ignorance is unquestionably bliss, at least in this instance. We, however, are far from intending to stigmatise all attorneys as bad—and the race of roguish lawyers would soon be extinct if roguish clients did not raise a demand for them. No man need have a knave for his attorney unless he chooses; and when he goes by preference to a roguish lawyer, it must be presumed that he has his reasons for not trusting his affairs to an honest one.—*Comic Blackstone*.

**BARON PENZANCE.**—The elevation of Sir James Plaisted Wilde, who has held the office of Judge-Ordinary of the Probate and Divorce Court since July 1868, to the peerage will give unqualified satisfaction to the legal profession and to the general public. There is no judge on the Bench whose conduct can be so easily criticised and so clearly appreciated by the suitors, because the principles and the procedure of the Courts of Probate and Divorce are perfectly intelligible to the non-professional community. Indeed, the Judge-Ordinary of the Divorce Court needs rather the possession of great moral qualities than high legal attainments, and we are unable to call to mind the name of any judge who, in temper, discretion, and good sense, has excelled Sir James Wilde. Old men can remember the time when judges seemed to forget the very existence of the suitors, and to imagine that a cause or an argument was a mere forensic struggle, in which judges and Bar had to take part for the better sharpening of their wits, or the better elucidation of the law. Sir James Wilde has taken precisely the opposite view of the duty imposed upon a judge. He has kept his attention steadily fixed on the suitor, and he has ever laid himself open to the charge of creating or encouraging irregularities in practice by his unflinching anxiety to save expense and do justice. We need not here enlarge on his legal acumen, his elegant diction, his lucidity of expression, and his accurate perception of human character. The honour of the peerage has never been more fairly earned by a judge. His Lordship takes the style and title of Baron Penzance, of Penzance, in the county of Cornwall. It will not be forgotten that Baron Penzance is the nephew of the first Lord Truro.—*Law Journal*.

**JUDGES ON HORSEBACK.**—The number of judges who have suffered from accidents in riding is somewhat remarkable. The lamentable accident to Sir Cresswell Cresswell will not easily be forgotten. Sir William Erie, who has always been conspicuous as a rider, has had more than one awkward fall, and we believe that Sir Rowland Williams has not been more fortunate. The present Chief Justice of the Common Pleas was, a short time ago, carried by his horse into a position of much peril at Working, and during the present assize the Chief Justice of England and Mr. Justice Hayes have both sustained falls.—*Law Journal*.

**NEWSPAPER DIRECTORY.**—G. P. Rowell & Co., the New York Advertising Agents, are about issuing a complete American Newspaper Directory. It is a compilation much needed, since no thing of the kind having any claims to completeness have ever been published. Messrs. Rowell & Co. have spared no pains or expense to make the forthcoming work complete. We understand the book will be a handsome octavo volume of about 300 pages, bound in dark cloth, and sold for \$5 00 per copy. As the publishers are Advertising Agents, their issuing a work containing so much information, usually jealously guarded by those in that business, shows that they are confident of their ability to be of service to advertisers, or they would not so readily place in their hands the means of enabling every one to communicate direct with publishers if they so desire.

## JUDGE JOHN WILSON—LAW REFORM ACT.

## DIARY FOR MAY.

1. Sat... *St. Philip & St. James*. Gram. & Com. Sch.
2. SUN. *Bogation*. [Fund app. Co. Tr. to make up books and enter arrears. Articles &c., to be left with Sec. Law S.]
6. Thur. *Ascension*.
9. SUN. *1st Sunday after Ascension*.
12. Wed. Last day for service for County Court.
14. Fri... Exam. of Law Students for call to the Bar.
15. Sat... Exam. of Art. Clerks for certificates of fitness.
16. SUN. *Whit Sunday*.
17. Mon. Easter Term begins.
19. Wed. Interm. Exam. of Law Stud. & Art. Clerks.
22. Fri... Paper Day, Q.B.; New Trial Day, C.P.
22. Sat... Paper Day, C.P.; N. T. Day, Q.B. Declare for County Court.
23. SUN. *Trinity Sunday*.
24. SUN. Queen's Birthday. P. Day, Q.B.; N.T. Day. C.P.
25. Tue... Paper Day, C.P.; New Trial Day, Q.B.
26. Wed. Paper Day, Q.B.; New Trial Day, C.P.
27. Thur. Paper Day, C.P.
28. Fri... New Trial Day, Q.B.
30. SUN. *1st Sun. of Trin.* [Last d. not. of trial Co. Ct.]
31. Mon. P. Day, Q.B.; N.T. Day, C. P. Last d. for Ct. of Revision finally to revise Assm. Roll.

THE

## Canada Law Journal.

MAY, 1869.

We are very glad to learn that Judge John Wilson, is gradually recovering from his alarming illness. He is out of immediate danger, and hopes are entertained of his ultimate recovery.

## LAW REFORM ACT.

Of the many cases that have been tried at the Spring Assizes throughout the country, many very important ones have been tried without the intervention of jurymen, and, so far we have heard no complaints have been made of the findings of the judges on questions of fact; and there seems to be no reason why they should not be (at least in those classes of cases which are ever likely under the present law to be left to judges as sole arbiters,) as satisfactorily determined by one of the judges of a Superior Court of common law, as questions of fact in a suit have hitherto been by an Equity judge. There may be some minor difficulties in Term, in ascertaining and deciding the exact position of cases tried under the new practice, but anything of this kind will soon be put right. We notice, however, an inconvenience, which, though only felt probably in a slight degree at an Assize with a small docket, becomes serious where, as in Toronto and occasionally elsewhere, several weeks are occu-

pied in the disposal of the business, and the inconvenience is this, that jurors are needlessly kept in Court, and away from their homes or business, whilst cases in which their services are not required are being tried. A simple remedy would be to provide that all jury cases should be tried first. A separate list might be made for them, to come on next in order after the disposal of assessments and undelivered issues.

Much greater evils were found during the last assizes as the result of this Act—firstly, the length of time prisoners are kept lying in gaol awaiting trial, very often for offences of the most trifling nature; and secondly, the great waste of time to all parties attending the Assizes, by the trial of all sorts of paltry offences, which could be as well at the sessions, or perhaps by a magistrate. It is all very well that individual convenience should give way to the public advantage, but the advantages to the public must be of a very tangible nature before some of the leading features of British justice—that every person accused of crime shall have a speedy trial, and shall be held to be innocent until found guilty—are overlooked. At one assize, at least, the presiding Judge remarked upon the hardship of keeping prisoners charged with some paltry offence in gaol for months without trial,—accused as one was for stealing a rail off a fence; another for stealing a hammer, &c. In one of these cases the learned Judge sentenced the prisoner after conviction, to one hour in gaol. Here the punishment came first, and the conviction afterwards;—rather hard it would have been if the accused were innocent after all.

Another practical result of the Act is, that County Court cases are tried by Superior Court Judges; and the cases which there is no time for the Judge of Assize to try, are either left for a County Court Judge to finish, or have to lie over for six months. Every day brings up some new difficulty, the result of this hasty attempt to reform what had much better have been left alone than badly done. The remedy is worse than was the disease.

Some one will doubtless try his hand at an amendment of the Law Reform Act next session, and he might take a note of these suggestions, amongst others, by the way. Perhaps, however, the most effectual remedy that could be devised for the many defects, known and unknown in this Act, would be to re-

## NOTICE OF APPEARANCE—LAW SOCIETY.

peal it *in toto*, and replace it with a more carefully prepared measure, dealing only with admitted defects.

## NOTICE OF APPEARANCE.

A word as to notice of appearance after time for appearance has elapsed:—

In the case of *Lanark and Drummond Plank Road Co. v. Bothwell*, 2 U. C. L. J. 229, Burns, J., intimated an opinion that when an appearance is entered after the proper time, the knowledge of the plaintiff that such an appearance was in fact entered was sufficient to dispense with a written notice by the defendant that he had appeared. This was coupled with a statement, that the plaintiff did not in that case give time for notice to be given before he entered judgment, though it did not appear that any attempt to give a written notice had been made. This decision, though it may have been reasonable enough under the circumstances of the case, and equitable and proper no doubt, so far as the adjustment of the rights of the parties between themselves was concerned, has unfortunately been made an excuse for indulging in a looseness of practice in the premises which, for many reasons, it is always desirable to avoid.

In a recent case in Chambers, the decision of Mr. Justice Burns was cited as an authority to the full extent of the note we have given of it above. But the Chief Justice of the Common Pleas, though he did not expressly dissent from it, objected to the state of things that would result from its being followed as a general rule of practice. And he further said, that if it should be necessary for him to decide (which it was not in the case before him,) whether the notice spoken of in the Act meant a written notice, and not a verbal notice or mere knowledge, his impression was that he should have to decide that such notice must be in writing.

## LAW SOCIETY—EASTER TERM, 1869.

## CALLS TO THE BAR.

Twenty-five gentlemen presented petitions for call to the Bar, of which the following passed the Examinations:—Messrs. S. S. Smith and Morrison (both without oral), Chisholm, Jameson, Smart, Norris, N. M. Clarke,

Gibson, Metcalf, Elliott, Hick, Dudley, Rutledge, King, Capreol.

## ADMISSIONS AS ATTORNEYS.

Twenty-two gentlemen presented themselves for examination for admission to practice as Attorneys. The following were successful—Messrs. Robertson, Livingston, Ferguson, (these three without any oral examination). Meredith, Cartwright, Biscoe, Corbould, Rutledge, Oliver.

Messrs. McIntosh, Kimber and Lewis, of the Quebec Bar, were, during the present Term, called to the Bar of Ontario, and admitted to practice as Attorneys in this Province.

We publish in this number an article taken from the *American Law Register*, criticising the discussion in a recent case on the question of the validity of legal tender notes in the United States; also, the report of a case in one of the courts of that country, wherein it was decided that in contracts for the payment of a sum certain in gold or silver coin, made prior to the passing of the Act making certain notes a legal tender, damages for non-payment must be paid in coin according to the contract. These will have some interest at the present time when the tendency of legislation seems to shew that we are approaching a somewhat similar state of things in respect to our currency.

In a recent number of the *Solicitors' Journal* (vol. 13, p. 294), are given the general orders under the County Courts Admiralty Jurisdiction Act, 1868. This Act, we believe, gives to certain County Courts in England, jurisdiction under some circumstances in Admiralty cases. When are we to have something of this kind in this country—either by means of a Court with exclusive jurisdiction in such matters, or by giving the necessary powers in urgent cases to County Judges in certain localities? All the arguments in favour of legislation on this subject *before* confederation, are trebly strong now. We believe it was intended to introduce a measure at the present session at Ottawa, to afford partial relief in the premises, but we have seen nothing of it as yet.

## LEGAL TENDER NOTES BEFORE THE SUPREME COURT.

## SELECTIONS.

## LEGAL TENDER NOTES BEFORE THE SUPREME COURT.

(From "The American Law Register.")

The recent discussion of the question of the validity of the Act of Congress creating the legal tender notes, before the Supreme Court of the United States, and the manner in which the question is viewed by the public in general, are certainly calculated to create, or perhaps we might more properly say to confirm, distrust in general public opinion, as an index or guide to truth. When the law was first passed it was regarded as evidence of disloyalty for any one to impugn the validity of that Act. The class of men, considerably numerous, indeed, and highly respectable in point of character, learning, and ability, who did openly denounce the act as an unworthy debasement, or attempted debasement of the public money of the nation, was encountered and assailed from every portion of the country as disloyal and unpatriotic; and certain epithets which were regarded as derogatory, and specially efficient in producing opprobrium and discredit, were freely heaped upon them, without measure or stint. At the present time, however, all this seems to be changed. Every one seems to feel at liberty to discuss the question of the validity of the law with the utmost freedom. But what is most remarkable in the discussion is, that while the best lawyers and the most cautious and conservative men in the country now approach the question with obvious diffidence and distrust in their own power to comprehend all its bearings, or to give it a satisfactory determination, the politicians, and letter writers, and others of the class who spend much of their time, as the Athenians did in the days of St. Paul, in hearing or telling some new thing, and who are supposed to reflect pretty accurately the general, superficial political public sentiment of the country, for the day, or the hour, exhibit a most amazing amount of flippancy and readiness to relieve all the doubts and difficulties of their hearers and readers by their own single and simple *ipse dixit*. And so common is it, in and about the Capitol, and in the leading city journals, at the great commercial centres of the nation, to hear and read the unqualified opinion and declaration, that the court will declare the law invalid with all but unanimity, that one is led to seek the explanation of this surprising garrulity against the law in the very quarters where but lately was found such inquisitorial intolerance of all such opinion, in some source of light and intelligence quite beyond any developments disclosed in the argument. It almost seems as if the authors of the act would now be glad to escape responsibility by invoking the aid of the court in declaring it void. But the court will do no such thing, for any such reason.

We had the agreeable opportunity of listening to the arguments before the court through most of the sessions for three successive days, and it was certainly such an intellectual banquet as is rarely exhibited in any forensic encounter. We do not care to venture upon any specific estimate of the particular excellencies of the successive advocates, where all were confessedly so able and so eloquent. We had listened to all the advocates, on other occasions with the exception of Mr. Potter, of New York. The opening argument in favor of the validity of the law was made by Judge Curtis, in his clearest, purest, happiest vein, as nearly perfect, both in matter and manner, as it is possible for us to conceive a law argument to be. Mr. Townsend, of New York, and Mr. Potter occupied parts of two days in reply, placing the main force of the argument on the ground of the impolicy and injustice of the law, and upon the early history of the Government and the Constitution, as showing both the improbability that the Constitution was intended to receive any such construction, and, as far as practicable, the fact that such was not the purpose of its framers, or of those who adopted it. These gentlemen commanded a good degree of attention, and made themselves, on the whole, very interesting.

The Attorney-General, Mr. Evarts, closed the argument with his usual copiousness of learning and fulness of illustration.

The only possible exception one can make to his manner of arguing causes in banc is, that he is, if possible, too deliberate, causing the attention of the court, after listening a considerable time, to rather flag, and lose something of that keen edge which it is always desirable to maintain throughout, if possible. A certain degree of deliberation and quiet self-possession adds very greatly to the force of a mere dry legal argument before a bench of judges, especially where, as in the present case, they are considerably numerous. And we know that Daniel Webster sometimes adopted this peculiar mode of argument with great effect in addressing courts; and juries possibly sometimes, but not by any means as a general rule. And he could do some things, sometimes, which it would be scarcely safe for any other man to attempt. As his favourite brother, Ezekiel, once said of him, "Brother Daniel could puzzle" [or even overwhelm] "a great many men that knew more than he did." No American, probably, and no Englishman, perhaps, ever possessed the power of manner which Daniel Webster seemed unconsciously to fall, or be driven, into. What seemed in him the inspiration of the moment, or the result of the secret and hidden springs of the cause, might not always appear so in others, at least on occasions of no special interest.

But bating this single and unimportant drawback in the Attorney-General's mode of speaking (which we are specially desirous of seeing improved to the extent of the Latin maxim, *festina lente*, on account of our great

## LEGAL TENDER NOTES BEFORE THE SUPREME COURT.

admiration of the man), it must be admitted that he presents one of the best models of forensic eloquence at present to be found in this or perhaps any other country. Mr. Evarts' dry law arguments, while abounding in all the learning and logic which it is desirable to find there, abound also with the richest and choicest illustrations which it is possible to conceive, or which the purest and most chastened rhetorician could desire. And this alone makes it necessary to occupy more time than would otherwise be required, and thus imposes a somewhat greater strain upon the powers of the orator. The argument of Judge Curtis fell far within the limits of one hour, and it commanded the most undivided and unflinching attention to the last moment; and as a presentation of the legal argument, and it aspired to nothing else, it was certainly of a most uncommon and unrivalled character.

But the general style or argument in this court is losing much of that conversational air which gave it such a charm thirty years ago, and which still prevails, to a great extent, in Westminster Hall. The present style of forensic debate there is more like that of Pinkney, and Emmett, and Lowndes, than the school that followed these great masters of forensic eloquence, which was far less ornate and discursive. Each has its advantages and its followers. But the present style of forensic debate in America is rather French than English, and is based, perhaps, somewhat upon Rufus Choate's theory, that if you would move the court and jury, you must first electrify the bystanders, and the audience generally.

But we are very far from any assurance that the ablest, and purest, and most learned courts, and the judges of this court possess all these qualities in an eminent degree, are sure to be most effectually convinced, upon a great constitutional question, by merely dry legal views. There was something so stirring in the many eloquent illustrations and appeals of the Attorney-General, that we could not but feel that very likely they would effect a lodgment in the sternest legal minds, where no force of pure cold logic could reach. We believe the ablest, and most experienced, and learned judges are more frequently induced to reconsider an over-established opinion, upon the force of a pertinent illustration, or an argument *ab inconvenienti*, or the *reductio ad absurdum*, than by any amount of mere deductive reasoning. But it is fair to say that taking the pure legal view of Mr. Curtis, and the mixed legal and practical view of the Attorney-General, there was nothing more to be desired on that side.

The argument upon the other side was considerably weakened in its force, upon the general question of the validity of the legal tender clause in the act, by the fact that the validity of gold contract, under the law, was also involved in the cases, and this of course caused considerable diversion and consequent loss of

force upon the main issue. One of the speakers, too,—whose argument was in the main very able and happy,—we are bound to say fell into the common fault of diffuse and ready speakers generally, of loading his argument with an infinite number of illustrations, drawn from every source of supposed analogy, many of which were far more doubtful than the main proposition, thus dividing attention of the court and dissipating the intrinsic force of his argument. Mr. Townsend, whose case was that of a gold contract, in terms, made a very close and learned argument, which we should be surprised to have overruled by the court, even if they maintain the entire validity of the act. Having spoken so much at length upon the argument in these cases, we shall be able to say less in regard to the questions involved than we have desired, or intended. But we shall present a brief *resumé* of the points, not much relied upon in the argument before the court, but which appear to us worthy of consideration.

The argument against the validity of the act seems to be placed largely upon the injustice and severity of its operation upon past transactions. This argument as it seems to us, is completely answered by the consideration that the validity of an act of legislation does not, in any sense, depend upon its innate wisdom or justice. Where the power of legislation exists, it is equally operative, whether its exercise be wise or unwise, just or unjust. And the same injustice is confessedly within the power of Congress, in regard to the currency, by debasement of the metallic coinage as by issuing bills of credit. The acts of Congress have more than once lowered the standard of the established coinage, and thus lessened the amount of standard gold or silver which subsisting contracts would require for their performance. And if this can be done in a small degree, it can equally be done to any extent which the government shall deem expedient, and thus effect the same depreciation complained of by making legal tender notes, so that this argument is thus effectually answered. It is a power which the National Legislature always possesses, and may exercise at will.

Again, much stress is often placed upon the historical fact that it was proposed in the convention framing the Constitution to give the express power to the National Government to issue bills of credit, and that this was not accepted, or, as it is called, was rejected. Now this is not by any means the same thing as if the power to make the Constitution had resided in the convention. It is not the same as if the proposition to emit bills of credit, had been submitted to the people and rejected. The most that can fairly be argued from this fact is, that the convention could not agree to submit to the people any express provision to enable the National Government to issue bills of credit. If this had been done, it must have been accepted in that form, or the whole

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Constitution would have been rejected. This might have been the prevailing reason which induced the convention not to embrace that specific provision in the frame of government submitted. It merely shows then, that, for some reason, the convention could not agree to submit that express provision.

But it by no means leaves the Constitution, as adopted, subject to any implications against the provisions being virtually implied in what was submitted and adopted, because this express provision was not embraced in it. The people had no knowledge of the discussions of the convention, or of the propositions discussed by it and not embodied in the Constitution, but acted upon the document as presented to them; and it is therefore fairly entitled to receive its construction upon what appears in it, without reference to any discussions or propositions before the convention and which did not result in any affirmative action. It is much like the case of a contract, since the passing of the Legal Tender Act, in which the parties, in their preliminary action, had attempted to define the currency, either gold or greenback, in which it should be payable, but could not agree, and therefore left it to legal implication. There would surely be no ground of argument, in such a case, that the parties had virtually fixed the currency in which payment should be made, or that because the parties failed to agree either upon gold or currency, both must be excluded. No principal of legal construction is more familiar, than that none of the preliminary negotiations can be received or considered in fixing the construction of a contract. And the same is true in regard to any written instrument, whether a contract, a testament, or a constitution. Each must speak by its own words, construed with reference to its subject-matter and the purpose of its creation.

If then the United States Constitution, like ordinary written instruments, is entitled to be construed by its language, with reference to those allowable aids to which resort is always made in such cases, we shall find less embarrassment in reaching a satisfactory conclusion than if we were compelled to regard the views of the framers or of the people, then or now, or any other outside influences, in the matter. No doubt tradition, or contemporary history, may, in many instances, afford great aid in learning the import of terms, or the general purpose and intent of an act or instrument, or contract.

In that view the known and declared facts recited in the preamble of the Constitution, wherein the transaction is declared to be the work or act of the people of the whole United States, is a very significant intimation that the purpose was to create a national sovereignty, and not a mere confederation among the states. The other portions of the preamble look in the same direction. "To form a more perfect union, establish justice, insure domestic tranquility, provide for the common

defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity," are all objects not to be expected from anything less than the establishment of a national and consolidated sovereignty.

Then the general frame of the instrument shows that the government was expected to embrace all the important, certainly all the indispensable powers and functions of national sovereignty, and that it was to be automatic, possessing all the functions and resources of sovereign states, viz., executive, legislative, and judicial.

As showing too the paramount and supreme power of the newly-created national government, the national judiciary is given the supreme function of defining and measuring all the national powers, and at the same time of defining and measuring the powers reserved to the several states under the National Constitution, be allowing writs of error to the highest judicial tribunal in the state from the Supreme Court of the nation in all matters affecting any power or function derived from or under any Act of Congress or the National Constitution, or where it was claimed that any conflict had arisen in regard to the validity of any state law by reason of its conflict with the powers and functions of the national government under its Constitution, and the decisions of the state court had been adverse to the national claim of authority.

Under such a distribution of the powers of sovereignty, it would be natural to find that the power of making money and declaring the value of the same should be reposed in the national government, as a clearly national function. This we do find to be the fact, either fully or subject to limitations. There can be no doubt that before creating the national sovereignty the general and unlimited power of making money, in all modes known to the law of free states, did exist in the fullest possible form in each of the states. And although the history of free states shows, that for commercial purposes a circulating medium of the precious metals is regarded as the most desirable, and the only desirable one, yet it is certain this has never been regarded as the exclusive currency of even commercial states. Almost all the European states have, in emergencies of great pressure, during war or in other great commercial crises, resorted to the issue of national bills of credit, by declaring them part of the money or circulating medium of the country. This question was incidentally involved in a recent case in the English courts of equity, where the Emperor of Austria sought to enjoin Louis Kossuth and one Day, the manufacturers, from preparing and issuing bills of credit in the name of the kingdom, or the king of Hungary. No question seems there seriously to have been made by counsel or entertained by the court but that such bills, when lawfully issued, would constitute a portion of the lawful money of the empire.



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*Emperor of Austria v. Kossuth et al.*, 7 Jur. N. S. 483, before V. C. STUART; s. c. before Court of Ch. Appeal, Id. 639; 2 Story Eq. Ju. § 951 e.

It is declared in *Craig v. State of Missouri*, 4 Pet. 410, and is a fact in history familiarly known, that the states, before the adoption of the Constitution, had repeatedly exercised the power of issuing bills of credit and declaring them lawful tender for private debts, that is, making them lawful money. The confederacy before the adoption of the Constitution, possessed no power over the subject of lawful tender, and were compelled to, as they repeatedly did, appeal to the states to declare the national bills of credit lawful tender.

This was one of the defects in the national authority, which it was the purpose of the Constitution to remedy. This was done by prohibiting the states from coining money or issuing bills of credit, or making anything but gold and silver a tender for private debts. This in effect took from the states all power over the subjects, both of making money and declaring legal tender. This seems to be so regarded by Ch. J. MARSHALL, in *Craig v. Missouri*, *supra*, where he shows very clearly that both these functions are prohibited to the states. This must be so if the states could neither coin money or issue bills of credit, since this covers the whole subject of tender laws. And accordingly we find that Congress has always controlled the subject of tender since the adoption of the Constitution, and the states have never attempted to interfere. This, of itself, is such a practical construction of the Constitution as must, on every sound principal, be regarded as settling the respective powers of the nation and the states over the subject of tender laws.

We think it fair too to say, that the entire power of making money is, by the Constitution, given to Congress. We have seen that it existed before the formation of the national government in all the states, and that it is now prohibited to them all. It must therefore exist in Congress, or not at all. If it had been the purpose of the Constitution to prohibit the power of issuing bills of credit and making them lawful tender, equally to the national government as to the states, it is impossible to conjecture why it should not have been done in the same or similar terms. The fact that both are distinctly and expressly prohibited to the states, and that not one word is said in regard to their being exercised by the nation, is certainly a very significant intimation that it was not deemed proper to extend the prohibition beyond the states, but to leave its exercise by the nation to the necessities and emergencies of after times, to be exercised or not according to future exigencies, the same as it exists in all free and sovereign states.

This is very obviously to be inferred from the consideration that the whole subject of issuing bills of credit and making them lawful money was familiar to the delegates, in the

then recent experience of the times, and especially must it have been present to their minds in making such express provisions in regard to its exercise by the states. It could not, therefore, have been supposed the national government would never have occasion to exercise such a power, since that had very recently been done by a national government possessing far less automatic power than the one then about to be created, upon the basis of paramount national sovereignty. Nor is it fair to conclude that it was then supposed there could never arise an emergency where it might be necessary to declare these bills of credit lawful tender or lawful money; since the nation had just had experience of that same necessity and had appealed to the states for the exercise of that same power, which they were now in express terms prohibiting them from exercising in future. And if it had been the purpose to extinguish and utterly abolish this power everywhere, we can conjecture no good reason why that should not have been done in terms, either by prohibiting all bills of credit as lawful money, or else declaring, as in regard to the states, that Congress or the nation should never make anything but gold or silver a lawful tender for private debts. We must surely conclude either that it was intended to abolish this known and important function of government or else leave its exercise to the nation.

Whether, therefore, we look for this power in the clause "To borrow money on the credit of the United States," or that "To raise and support armies," which is evidently but a subdivision of the former, or whether we find it embraced under the liberal and only sensible construction of the power to "coin money, regulate the value thereof, and of foreign coin," is not very material. It must be obvious to all that an instrument creating a paramount national sovereignty, and prohibiting the exercise of all sovereign national functions, such as making money, by the states, should not, except upon strict necessity, resulting from the terms used, be so construed as to destroy or essentially abridge so important and indispensable a national function as the creation of paper currency upon great and pressing emergencies; a function exercised by all commercial states in those trying exigencies which, as in all future time must be expected to occur.

We only desire further to say that it seems to us that the courts and the profession have manifested more refinement than wisdom in giving the clause in the Constitution, "to coin money," such a precise and literal interpretation as to exclude all paper money under all circumstances. In its most literal sense it will extend to all kinds of metal, to iron and tin, as well as gold and silver, and perhaps also to every substance capable of receiving and retaining an impression, for coining in its most literal import means nothing but stamping with a device. Any material, therefore, which can be stamped may be coined. And

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in that sense any impressible material, even paper, is susceptible of literal coinage. But the true construction unquestionably is, that the more common mode of creating money is here, by a figure of speech, put for the whole, and that "coining" money means nothing more than *making* money. For unless we do adopt this construction, there is no power by which money of gold and silver can be made in any other mode except coinage. It could not be done by weight, in the form of bars or bullion, or by stamping pieces of gold or silver, short of coinage, or by any other known or newly-discovered device. Such a narrow and literal construction of language would never be adopted in regard to the interpretation of other written instruments. The *endorsement* of notes and bills, which literally imports an assignment upon the *back* of the instrument, may just as well be upon the face of the instrument, as has been often decided. So also a contract for the *manufacture* of cloth, or machinery or any other thing, where it was susceptible of being done, either by hand, as the word literally imports, or by machinery, would never be received in a strict literal sense. All that is implied is, that it shall be so made as to answer the ordinary purposes and objects of such fabrics in the market. These illustrations might be carried to any extent. Any court which should assume to give language any such literal construction, in regard to an incidental and collateral matter, only implied from the etymology of the terms used upon any other subject, would shock the common instincts and common sense of mankind. And why that strict and extremely literal construction of this clause of the Constitution should be so strenuously insisted upon on this subject, any more than upon other portions of the instrument, is not easily explainable. If one of the most accurate of English writers could speak of "coining blood for drachmas," why may not a nation coin money in all the modes known at the time the power is created, and thus stamp its own paper with the quality of lawful money? Few men will argue that the government might not stamp the quality of money upon gold and silver without literally coining it, and if so, why may it not effect the same thing with its own paper, as no limitation is found, surely, in regard to the material of which money shall be made by the national authority? It may be of any metal or other material susceptible of coinage. The same thing may be effected by stamping such material. Is paper, therefore, certainly excluded? Can that be fairly said when it was one of the known modes of making money at the time, and present to the minds of the farmers? If money may be coined out of paper, it is surely none the worse for containing the promise of the government.

It may undoubtedly be fairly argued that this power of emitting bills of credit and stamping them with the qualities of lawful money, was not intended to be given as the ordinary

mode of making money. It was not expected the nation would attempt to do, under ordinary circumstances, what all nations regarded as destructive policy, except in times of war or extreme emergencies. The same is true of borrowing money, which is one of the express powers granted in terms most unquestionable. No nation can borrow money for its ordinary current expenses and not come to ruin and bankruptcy, any more than an individual could do the same and not lose credit. Current expenses must be met by current income or all credit and character is lost, both personal and national.

To argue that no power to emit bills of credit and stamp them as lawful money was intended to be given to the nation, but that still this may be done in all great emergencies, when it is impracticable to maintain the national life in any other way, seems to us very nearly equivalent to saying that the power is not given at all as an ordinary function of government: but it may be resorted to, by way of spasmodic convulsions, in the last throes of existence. This seems to be an admission that it is not given but may be assumed in *articulo mortis*, the same as the people may resort to the inherent right of revolution when the oppressions of the existing government become intolerable! This is a species of legal construction not judicial in its character as it seems to us. We would sooner presume it, as a necessary incident of national sovereignty.

Such an argument seems to us rather political than legal; a function of the legislative or executive authority, rather than of the judiciary. If the power to emit bills of credit and stamp them as money is not given in the function of borrowing money and coining money, it seems to me, with submission, that it is not given at all. But it seems very clear to us that these express powers of borrowing money and making money must be supposed to have been given to be exercised, not only in all the then known and usual modes of doing those things, which will cover the present issue of treasury notes, but also in all future modes and emergencies which might be desirable as they should arise. This is the only mode of construing the Constitution which will make it answer the purpose of its adoption. Upon any other mode of construction a written constitution must become an intolerant hamper and impediment to the just development and growth of the national life, which should surely be avoided if the courts possess the power of rising to the demands of the exigencies of advancing time, which is one of the indispensable functions of judicial construction, and which can alone render written laws endurable.

I. F. R.

## LIABILITY OF GRATUITOUS BAILEES.

## LIABILITY OF GRATUITOUS BAILEES.

There are many advantages, in the system, or want of system, by which English law is allowed to grow, now in one direction, now in another, as new questions arise for judicial decision. It gives great flexibility to the law, and allows, as the wants of the people change, a constant and even development without the aid of Legislative enactments. There are, however, on the other hand, great disadvantages in this method of law-making, not the least of which is the doubt and confusion that is often caused by carelessly-given judgments which, even although they may be correct in their conclusion, may yet cause much harm if they contain inaccurate statements of principles or ill-considered *dicta*. Succeeding judges are slow to overrule the decisions of their predecessors, or even to express dissent from the *dicta* ascribed to them in their reports. The consequence of this is, that an erroneous decision, or even a correct decision on erroneous grounds or inaccurate *dicta*, may cause much difficulty in the law, and may remain for years neither overruled nor altered, although the errors may be generally recognized. It is not until some state of facts requires a decision directly on the point that a judicial expression of disapproval can be obtained.

The law respecting the liability of gratuitous bailees is a curious instance of the way in which confused and incorrect legal notions may arise, and be continued for a long series of years with but the merest shadow of authority in their support. The case of *Coggs v. Barnard* (1 Sm. Lead. Cas.) is the leading case on bailments, and the judgment of Holt, C.J., has received a great deal of praise, and is often spoken of in very exaggerated terms. Its real merit is that it endeavoured to treat the whole subject of bailments in a more complete and scientific manner than had before then been attempted, and it was, no doubt, useful at the time it was delivered (A.D. 1704) when there were but few law-books of any kind. If the judgment is to be considered with reference to the present state of the law, it is open to much criticism. It is unnecessarily elaborate, and, for the sake of an apparent symmetry, useless distinctions are made between different kinds of bailments. The point actually decided was, that "if a man undertakes to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage." Holt, C.J., examines generally the law of bailments, and says that, "where a man takes goods into his custody for the use of the bailor, he is not answerable if they are stolen without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect." He then goes on to say that, in the case of a loan, the borrower is

bound "to the strictest care and diligence to keep the goods," and if the bailee is paid for the bailment he is "bound to take the utmost care," but that if, notwithstanding such care, the goods are lost or destroyed, in either of these cases the bailee is not liable. Holt, C.J., therefore thought that there was a clear distinction between the liability of an unpaid bailee and of a paid bailee or borrower. It has been usual, since this decision, to say that a paid bailee or borrower is liable for simple "negligence," but that an unpaid bailee is liable only for "gross negligence."

As the liability of a paid bailee and of a borrower is the same in common sense, as well as by the judgment of Holt, C.J., and all other authorities, what is an authority in the one case is an authority in the other, and the two classes of cases may be dealt with together.

If the mere fact of payment affects the liability of a bailee, it is convenient to distinguish between the negligence which will charge a paid and that which will charge an unpaid bailee, and the terms "negligence" and "gross negligence" answer very well for this purpose. If, however, the mere fact of payment does not alter the liability, the negligence necessary to charge the bailee in either case is the same, and the term used to denote that negligence ought also to be the same.

After the decision of *Coggs v. Barnard* it was discovered, as might have been expected, that the difference made by Holt, C.J., between "gross neglect" and neglect of the "utmost care" was extremely vague and unsatisfactory. It was difficult for a judge to direct a jury accurately on this principle, and the difference itself was rather a subtle creation of the law than a substantial difference which could be practically recognised in dealing with the two classes of bailments. Every bailment gives rise to a contract the terms of which may or may not be regulated by express agreement. If there is no express agreement, the idea that is present to the mind of both parties on the delivery of the goods whether the bailee is or is not paid, would almost without exception, be that the bailee was to use that ordinary diligence and care in preserving the goods which, under the circumstances, any man of ordinary prudence would adopt, and the contract implied by the law in such a case ought to be to that effect. Although this is opposed to *Coggs v. Barnard*, there is ample authority for the proposition that such are the terms of the contract now implied by the law on a paid or unpaid bailment without any express agreement. *Coggs v. Barnard* has never been formally overruled, and the correctness of the actual decision has never been questioned; but cases have been decided which are inconsistent with some of the *dicta* of Holt, C.J.

The case that most clearly shows the liability of a gratuitous bailee is *Wilson v. Brett* (11 M. & W. 113). The defendant rode a horse of the plaintiff's gratuitously, at the plaintiff's request. The horse fell on a piece

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of marshy ground, and was hurt. In an action against the defendant, charging him with having negligently injured the plaintiff's horse, it was proved that the defendant was skilled in the management of horses. The jury were directed to say "whether the nature of the ground were such as to render it a matter of culpable negligence to ride the horse there, and that, as the defendant was skilled in the management of horses, he was bound to take as much care of the horse as if he had borrowed it." It was held that this direction was right, and that "in the case of a gratuitous bailee, when his profession or skill is such as to imply the possession of competent skill, he is liable for the neglect to use it," "in the same way as if he had been a borrower." Rolfe, B., also says, "I see no difference between 'negligence' and 'gross negligence'; it is the same thing with the addition of a vituperative epithet." This judgment, in effect, decides that payment *per se* does not necessarily affect the liability of a bailee, as it places the liability of a borrower, which is the same as that of a paid bailee, and of a gratuitous bailee upon the same footing. This view of the law has been approved in *Grill v. The General Iron & Co. Company* (14 W. R. 898), and in *Beale v. The South Devon Railway Company* (12 W. R. 1115). These three cases, besides other authorities, show that all bailees, whether paid or not, are liable for the want of reasonable care and for nothing else. That, however, which would be reasonable care by one man is not necessarily so by another. All the surrounding circumstances must be looked at. If a watch is given to a watchmaker to be repaired, he is bound to use such skill and care as an ordinary watchmaker might be expected to possess. If a watch is given to be repaired to a person who knows nothing of watches, he will be bound to use such care as may reasonably be expected from an unskilled person. In each of these cases the bailee will be liable if he is negligent, but that which would be negligent in the skilled workman would not necessarily be so in the unskilled man.

This liability would not be necessarily affected by payment. In each case ordinary care must be used, whether the bailee is paid or not. Payment may, however, sometimes indirectly affect a bailee's liability. If a person offers to do any act, as, for instance, to repair a watch for reward, he may, and in many cases certainly would, be understood to hold himself out as having competent skill to repair watches. If he either has such skill, or has represented that he has it, he is liable for any neglect of the ordinary care of a skilled workman. If, however, the payment was made under circumstances which did not amount to a representation of skill, the bailee will only be liable for neglect to use such knowledge as he in fact possesses. This is the only real distinction between paid and unpaid bailees. The payment may be evidence of a representation of skill. If it does not

amount to this, it does not affect the liability.

As a matter of fact, paid bailees are usually skilled persons, or have represented themselves as such, while unpaid bailees are generally unskilled. Hence there is, perhaps, in the majority of cases, a difference between the liability of paid and unpaid bailees, but this difference does not depend on the payment, but on all the surrounding circumstances under which the bailment was made. An unskilled workman is not often paid for work which requires skill, unless he represents that he has skill, and a skilled workman seldom will work without payment. The question in each case is what were the circumstances from which the contract is to be implied, and payment may be a circumstance which should be considered, but it cannot itself directly affect the contract. Although this is clear, both as a matter of law and of common sense, text writers have not yet consented to consider the dicta of Holt, C.J., in *Coggs v. Barnard* as overruled. Almost all text-books, which treat of bailments, and even many judgments, still recognise, by their language, the distinction between paid and unpaid bailees, and between negligence and gross negligence. *Giblin v. M'Mullen* (17 W. R. P. C. 445), lately decided by the Judicial Committee of the Privy Council, affords an example of the vitality of a legal error when once enshrined in a judgment; and the case is also a specimen of the careless and slovenly judgments which unfortunately are not uncommon in our courts. The point for decision was as to the liability of a banker for the loss of securities deposited by a customer. The question was a very simple one, and the only wonder is, that it should have come before the Privy Council at all. It was admitted (although it is surprising that the point was given up) that the banker was a gratuitous bailee. The evidence showed that all reasonable and ordinary care had been employed to preserve the securities which had been lost. It was held that the banker was not liable. The authorities were clear in the defendant's favour, and the whole decision might have been comprised within the limits of a very short judgment. The Court, however, unfortunately took the opportunity of considering the liability of gratuitous bailees generally, and also discussed the meaning of "gross negligence."

The question for decision, as stated in the judgment, is, was there "that degree of negligence which renders a *gratuitous* bailee liable for a loss?" The negligence which must be established against a *gratuitous* bailee has been called 'gross negligence.' Of course, if intended as a definition, the expression 'gross negligence' wholly fails of its object. But, as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the terms may be usefully retained as descriptive of that

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difference." This undoubtedly implies that gratuitous bailees are, as such, under a liability different from that of paid bailees. The meaning of "gross negligence" is then discussed, and the conclusion arrived at is that "the epithet 'gross' is certainly not without its significance;" but that significance is nowhere explained, and, indeed, as far as we can gather any meaning from this part of the judgment, it seems that the duty of a bailee (whether paid or not) cannot be defined; but he must wait until an action for negligence is brought against him, and he will then find out from the direction of the judge and the verdict of the jury what amount of care he ought to have exercised. Having arrived at this conclusion as to the state of the English law, the judgment comes to the point of the case, and decides "that the bank were not bound to more than ordinary care of the deposit entrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs."

No fault can be found with the law thus stated, as it is well supported by authority: but this decision, that "the banker was not bound to use more than ordinary care," would have been equally applicable if the banker had been paid for the deposit. There is ample authority to show that this would have been the correct and indeed the only proper direction of a jury in the case of a paid bailee. It follows, therefore, that, by the decision of *Giblin v. M'Mullen*, the liability of an unpaid bailee is the same as that of a paid bailee.

This decision, taken with the remarks which precede it, creates this curious contradiction on the face of the judgment. First, it is stated that there is, as a matter of law, a distinction between the liability of paid and unpaid bailees; secondly, that the bank were unpaid bailees; and, thirdly, that the liability of the bank is precisely the same as if they had been paid for the deposit. This is no exaggeration of the result of this judgment. The whole course of reasoning in the judgment, and the principles there recognized, lead logically to a decision the very reverse of that which was arrived at.

*Giblin v. M'Mullen* is therefore right in its result, but that result is arrived at in a most extraordinary manner. The whole framework of the judgment, the *dicta* that are scattered through it, and the grounds of the decision, resemble the hasty remarks that sometimes fall from a wearied judge at a *Nisi Prius* trial when there is no time for argument rather than the deliberate decision of an ultimate Court of appeal whose decision is final and binding upon inferior courts. The case can hardly fail to cause confusion in the law, as the principles recognized in the judgment revive an old and mischievous legal error, the authority for which has for some time been considered as overruled, and those who dis-

approve of case law are furnished with an excellent illustration of the careless way in which that law is sometimes made.—*Solicitors' Journal*.

## SPECIAL PLEADERS.

We must confess that the decay and possible extinction of the noble race of special pleaders has always been to us a subject of peculiar interest. In the time of special demurrers and replications *de injuriâ*, and when it was rather more important to understand the distinction between trespass and case than it is at present, no one can wonder that pleaders were plentiful. But it is not perhaps so well known that nearly every one who in those days hoped to make his mark as a sound lawyer began practice as a pleader, and put off joining circuit until he had secured a fair number of clients. It is hardly necessary to remind any one that the Bench whose decisions were reported by Barnewall and Alderson consisted entirely of pleaders of renown, and that at a later period Patteson, Wightman, Crompton, and Hill sat in the same Court, after spending a great part of their professional lives below the bar. Moreover, two illustrious advocates, Lord Ellenborough and Lord Lyndhurst, thought a few years of a pleader's life a good introduction to the profession. No one need be reminded that all this is now changed. The Law List tells us that there are not more than sixteen or seventeen gentlemen who have certificates to practise as special pleaders 'not at the Bar,' and with the exception of the present Chief Justice of the Common Pleas and Baron Bramwell, we believe that all our present judges made their way to the bar in the ordinary course.

Of those who remain below the Bar a large proportion are in very good practice. Any one who attends a summons at Judges' Chambers is pretty sure to see some of the learned gentlemen pacing the flagstones surrounding Rolls Garden, and their chambers are crowded with pupils. If we ask why the number of pleaders has become less, we are told that it was the Common Law Procedure Act which did it. This statute introduced pleading for the million, and it was no longer worth anybody's while to cultivate the science. A pupil fresh in chambers will hardly be satisfied with this reason. He sees the table of his preceptor piled with papers, including not only instructions for pleadings but instructions to draw up all sorts of documents and cases for opinion of infinite variety. During the assize time the pressure is tremendous. Pleader, pupils, and clerk are at work upon draft and foolscap from morning till night. There are conferences, a stream of questions on points of practice, and constant rushes to the Judges' Chambers. Who can describe the amount of experience which a pleader must acquire? His fees may be small, but the questions submitted to him are most carefully considered, and require a thorough insight into every

branch of common law with a tendency to encroach upon equity. Half-a-dozen difficult cases in the same province of tort or contract may be brought up his staircase in as many days. With the exception of some vexatious delays at Rolls Garden, the learned gentleman has no need to waste any time. He is not obliged to wait for hours on the back benches till their Lordships have been through the Bar, or at Nisi Prius to read the newspaper *ad nauseam* till he hears that 'no other case will be taken to-day.' Most of his time is spent within reach of his book-shelves, and if he has any moments to spare from his work he feels that it is his duty to bestow them on the young gentlemen in the next room. His holidays are few, and he sometimes contents himself in the long vacation with coming to Chambers an hour later, and leaving an hour earlier. We have dwelt upon the advantages which are afforded to clients by his learning and experience, but another remains to be mentioned. It often happens that the counsel retained to hold the brief upon the trial of a case is an excellent advocate but an indifferent lawyer. By engaging a pleader in the earlier stages of the cause it is possible to effect a division of labour without exciting the ill-will or jealousy which would ensue if one barrister were replaced by another. Looking at these advantages, we should be disposed to think that whatever changes in the practice of pleading have been or may yet be effected, there will always be room for a body of practitioners so eminently useful as the one which we have described. And so long as there is a reasonable demand for the services of a pleader, we cannot see why any one should object, for a time at least, to practise below the Bar. There are, it is true, a few disadvantages in postponing one's call. No matter how ancient may be the standing of a pleader, he is not eligible for several valuable appointments, including that of County Court judge. But the chance of getting practice and experience a long time earlier than is usual is a good set-off against such disabilities.—*Law Journal*.

In an interior county of Ohio, in a criminal court presided over by a judge of considerable humor, a notorious thief was on trial for larceny. The principal question of fact in the case was whether the property stolen was worth thirty-five dollars, or less than that amount. According to the statutes of that State, if the value amounted to this sum, the offence was grand larceny, and the penalty would be imprisonment in the penitentiary, where the rogue rightfully belonged. After the jury had been out for several hours, they returned into court, and said to the judge that they could not agree unless he charged them whether they should estimate the goods at the wholesale or retail price. Thereupon the judge enlightened them thus:

"Well, gentlemen, considering the way the rascal came by the goods, I don't think the court can afford to wholesale them to him.

## ONTARIO REPORTS.

### ELECTION CASE.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law,  
Reporter to the Court.)

#### REG. EX REL. CORBETT V. JULL.

*Municipal election—Improper conduct of returning officer—Election by acclamation.*

At a meeting called to receive nominations for municipal Councillors, one party, as they alleged, made their nominations at 12 o'clock, or a few moments after, in the presence of only two or three persons, and without any effort on the part of the returning officer to call in the people outside the place of meeting. The returning officer did not enter the names of the candidates in his book, and gave evasive answers to some of the other party who came in afterwards, as to whether any nominations had been made or not, and led some of the electors present to think that there was an hour or so to make nominations, when in fact there was less than half that time. At 1 o'clock the returning officer, without making any preliminary statement that certain persons had been nominated, and without asking whether there were any other candidates to be nominated, declared that the persons nominated at the opening of the meeting were duly elected by acclamation. The other side, who were waiting, as they alleged, to make their nominations after the other party, under the impression that no nominations had as yet been made, protested against this, and desired to nominate the opposition candidates, (of whom the relator was one,) which the returning officer, however, refused to receive as being too late.

*Held*, 1. That the election must be set aside, and a new election ordered.

2. That the relator was a candidate and voter within the meaning of sec. 103 of municipal act, and that the returning officer could not by his illegal acts divest him of his rights in that respect.

3. That the names of the candidates should have been submitted to the meeting *seriatim* after the hour had elapsed, and an opportunity given to the electors present to express their assent or dissent, without which there could not be said to have been an election by acclamation.

4. That the returning officer had acted improperly and contrary to the spirit of the law, and was therefore ordered to pay the costs.

[Chambers, Feb. 26th, March 8th, 1869.]

This was a *quo warranto* summons on the relation of John Corbett against Thomas Jull, as reeve of the village of Orangeville, and Thomas Jackson, Peter McNabb and Joseph Pattullo, councillors of the same village, to have their elections respectively declared invalid and void, for the following causes:

1. That the said election was not conducted according to law, in this, that the said Thomas Jull, John Anderson, Thomas Jackson, Peter McNabb and Joseph Pattullo, or any or either of them were not duly proposed and seconded according to law, nor were the said parties duly proposed and seconded at the place appointed for such by the returning officer, nor were the said parties proposed and seconded within the time required by law.

2. That the said Thomas Jull, John Anderson, Thomas Jackson, Peter McNabb and Joseph Pattullo, were not duly or legally elected or returned in this, that the said parties were not duly proposed within the proper time or at the proper place, nor were they proposed according to law.

3. That the returning officer did not wait for one hour after the last candidate had been duly proposed and seconded as is required by law so to do, but improperly and illegally declared the said parties duly elected councillors for the year 1869.

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4. That the returning officer acted unjustly and illegally in conducting the said election, in this, that he told several intending candidates and electors that he had an hour to come and go on—meaning thereby, that it would be an hour before he closed the proceedings, and about fifteen minutes afterwards declared the defendants duly elected reeve and councillors respectively.

5. That the returning officer conducted the said election unjustly and illegally.

6. That the proceedings made necessary by law to the validity of said election were not observed by the returning officer at said election to the prejudice of the electors of the village of Orangeville.

The relator claimed an interest in the election as a candidate for the office of councillor, and who tendered his vote at said election for both reeve and councillors.

The defendant, Peter McNabb, disclaimed on the 28th January, 1869.

The returning officer was made a party to the cause and answered with the other defendants.

A number of affidavits were filed on both sides, but the further facts will be sufficiently understood from the judgment.

*McMichael* for the defendants shewed cause.

1. This is not a case within the Act. The relator is not a candidate as he was not nominated; and is not an elector as he did not vote or tender his vote: sec. 180, Municipal Act; *Reg. ex rel. White v. Roach*, 18 U. C. Q. B. 226; *In re Kelly v. Macarow*, 14 U. C. C. P. 457; *Reg. ex rel. Bugg v. Bell*, 4 U. C. L. J. N.S. 93. There may be a remedy at common law by full court, but not under these proceedings. It was the fault of the relator and his friends that they did not make any nominations they chose, and they cannot now complain that they did not do so.

*Harrison, Q.C.*, for the relator. The new procedure is in place of the common law remedy: see *Roach's case ante*; and this proceeding is not touched by the cases cited, which speak of electors not taking the trouble to propose candidates, and evincing a carelessness as to their interests. But, here the relator's party were waiting and ready to make their nominations, but were deceived by the returning officer as to the position of affairs. If a returning officer can act thus, he can in effect abrogate the statute and destroy the rights of electors.

JOHN WILSON, J.—The preliminary and first question is whether under the circumstances disclosed, the relator was entitled to his seat under our statute, and secondly, whether there was such an election in fact, as can be sustained.

The clerk of the municipality of Orangeville is Francis Grant Dunbar. He is the clerk of Joseph Pattullo, attorney-at-law, one of these defendants. On the 8th December, 1869, Mr. Dunbar, as clerk of the corporation, published the usual notice, that a public meeting of the electors of the village of Orangeville, would be held at Bell's Hall, the place where the then last election had been held, on Monday the 21st of December, 1868, at the hour of 12 o'clock noon, for the purpose of nominating a reeve and councillors or the said village.

It is stated by a number of deponents, and not denied by any of the defendants, that a contested election was anticipated, and the village had been canvassed with a view to an election. There are, as is usual, contradictory statements as to what occurred during the hours between the opening and close of the proceedings, and as to when the proceedings were opened and closed, but I think there is no fair ground for saying, that the proceedings commenced after, but sharply after 12 o'clock noon. Without discussing every controverted point in these proceedings, I shall be able to dispose of both points chiefly from the statements of the returning officer, and one of the affidavits in reply. The returning officer on oath says, "before leaving the office of Mr. Pattullo (for the purpose of holding the nomination), I borrowed Mr. Pattullo's watch for the occasion. At a few minutes before 12 o'clock noon, I left the law office of Joseph Pattullo, Esquire, and went to the hall named in the proclamation, and shortly after entering said hall, I looked at my watch, and waited until 12 o'clock, when rising to my feet, I formally opened the nomination by announcing to those then present that it was now 12 o'clock, and that I was prepared to receive nominations for reeve and councillors for the ensuing year, and that if no more than the necessary number of candidates for the several offices were nominated within an hour after the last nomination, I would close the nomination and declare those nominated duly elected by acclamation."

I may here refer to a fact, on which the returning officer offers no explanation. He had a book, but I hear of no entries in it of nominations. He was sitting, according to the sworn statement of McCarthy, between 12 and 1 o'clock, with a book before him, open, but blank. Blank, the relator contends, that the electors might be misled by the concealment, which he was practising upon them.

I now read the returning officer's further account of his own proceedings on oath. "I then took my seat at the table, and George Bell, a duly qualified elector ascended the witness box and nominated Thomas Jull for the office of reeve, which was seconded by Thomas Hunter. Bell then nominated Mr. John Anderson as councillor, and the said Hunter seconded the nomination. James Ferguson, another duly qualified elector, then nominated Thomas Jackson as councillor, seconded by Hunter; said Hunter then nominated Joseph Pattullo, seconded by Thomas Jackson; Thomas Jackson then nominated Peter McNabb, seconded by James Ferguson, all of which were made publicly, openly and audibly, and as required by law after and at the hour of 12 o'clock: that no other nomination or nominations for the offices of reeve and councillors was made within the hour, and I declared Thomas Jull, John Anderson, Thomas Jackson, Peter McNabb and Joseph Pattullo, duly elected reeve and councillors respectively for the village of Orangeville for the year 1869."

He says "I never spoke to any of said candidates or any other person or persons about the nominations before entering the hall," and he denies any conspiracy or arrangement to keep the nominations quiet and secret until the lapse

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of an hour and that he received the nominations in good faith, and that the election was conducted strictly within the law so far as he was able to understand it. He says, "I neither omitted or exceeded any part of my duty as returning officer, and the said nominations and election were fairly and impartially conducted, and any person had ample time and opportunity, and the full allowance made by law to do so: that I was ready and willing to receive nominations from the time I opened the nomination until the declaration, and I did receive all that were offered, and if any intending candidate was not nominated he was himself to blame for not procuring his nomination within the time required by law."

The relator by his affidavits charges upon the defendants, that they conspired to carry the election by means of opening the proceedings before 12 o'clock, and making their nominations when none of the electors, excepting those necessary to make the nominations were present, and by concealing from the electors and other candidates that nominations had been made; and that this was done while the new candidates were waiting for the nomination of the old ones, as they supposed, that they might then make their nominations: that the returning officer by evasive and false answers to questions as to the state of proceedings, kept them off their guard for an hour, and then suddenly declared the defendants duly elected by acclamation without giving the electors an opportunity of nominating their candidates, and when they instantly rose to remonstrate and make them, he refused to hear them.

Maitland McCarthy says "I am a duly qualified elector of the village of Orangeville, and as such, went to Bell's Hall for the purpose of nominating candidates for reeve and councillors for the municipality of the said village; that I arrived there about twenty-five minutes after 12 noon, that on entering the hall I met the returning officer and Thomas Jull, who was afterwards declared reeve, in conversation close by the door of the hall. Jull soon after left the hall and the returning officer returned to his seat. I went to the returning officer's table and looked at the paper before him, and seeing it blank, asked him if he had received any nomination yet, to which he replied, 'I have not received any.' No nominations were made after I got to the hall. About fifteen minutes to one, Thomas Jackson came into the hall, and shortly after the returning officer left his seat and went to Jackson who was then close to me, and in my hearing asked Jackson, "are they not coming down?" remarking, "it is time," upon which Jackson left the hall, and about one or a little after, Jull, Anderson, Pattullo and some others entered, and almost immediately after the returning officer stood up and declared Jull duly elected reeve, and Anderson, Jackson, McNabb and Pattullo, councillors. I protested as strongly as possible against the extraordinary conduct of the returning officer, after being informed by him not half an hour before that he had received no nominations, and I then nominated a person as a candidate for councillor which was duly seconded, but the returning officer refused most positively to accept such nomination or any other, although several were made, stating he did not care for the electors or

the council. That on leaving the hall, I met Jackson who had just been declared elected; I told him if he wished to wash his hands of such a corrupt work, he had better go back and repudiate all connexion with it and decline to accept office in such a way. Jackson replied, that he had nothing to do with it, and did not know anything of it, and had told them he would much sooner remain at home.

Various other affidavits were filed on both sides, but they did not materially alter the complexion of the case.

The conducting of an election is analogous to any public meeting where the object sought is a fair expression of opinion on any question proposed. A resolution is said to be carried by acclamation, when, after it has been proposed and heard, it receives no opposition, but is carried by the consent of the meeting, expressed or implied from its silence, but in no case can it be correctly said to pass by acclamation, where it has not been proposed or not understood.

The law in regard to elections, assumes, that when the election of any officer is carried by acclamation, the electors are fully and fairly informed of what they are assenting to by acclamation. They cannot assent to what is not submitted to their choice or present in their minds. A nomination is a resolution submitted to the electors, that the party named is a candidate for their suffrage, for an office named, but the legislature to present surprise requires that not less than one hour shall elapse between the submission of the last nomination and the putting of the question with a view to its being passed by acclamation. In the mean time the vote is in abeyance. The statute does not mean that, the returning officer, if no other nominations are made, shall simply declare those who had been proposed duly elected, it means that these nominations shall be put *seriatim* to the electors and then votes taken upon them. The law prescribes no form of words, but it requires that the proposition should be explained so as to be understood by men of ordinary understanding. Now this election is said to have been carried by acclamation. When was the acclamation? Was it when the movers and seconders were present, and perhaps one or two more when the nomination was first submitted? Certainly not. Was it when the declaration was made? Certainly not, for no one heard then who had been nominated, nor was it at any other time submitted to the electors as a question to vote upon—no opportunity was given to say or not to say, if it was carried or not carried. They had then no knowledge of *what* was carried by acclamation. Did the electors generally know that the simple declaration of the returning officer was to imply their consent and bind them to the election? Certainly not, for some of them indignantly protested against its injustice, and commenced to make other nominations. When the hour had expired, it would have been proper for the returning officer to have called the attention of the electors then present to the fact of the expiration of the time, and to have announced that Thomas Jull had been nominated at twelve o'clock, or soon after as the fact was, by George Bell as reeve, seconded by Thomas Hunter, and that if no other nomination was made, he should assume



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him to be elected by acclamation, and declare him elected accordingly. If, after a reasonable pause no other nomination was made, the declaration of his election should have been announced. And so with the other nominations *seriatim*. They ought not to have been submitted together, for it would thus become a compound question and embarrass the electors.

By requiring an hour to elapse between the nomination and the proceeding to close the election, in case of no further nominations, the Legislature meant to protect the electors against haste and surprise, and in no case does the law require so strict an adherence to its letter as to defeat its object and spirit.

It is the duty of a returning officer to stand indifferent between contending parties; to have no interests to serve for either or for himself; to approach his duty with the simple desire to do strict justice, to be ready and willing to give reasonable information as to the state of his proceedings, to conceal nothing, to evade no proper enquiry, to mislead no one by his silence, or exhibit any thing calculated to deceive, and he ought not to make a pretence of strictly following the letter of the law to defeat it.

Leaving out of the question all disputed facts, and taking the returning officer's own account of his proceedings, and acquitting him and defendants of any conspiracy or pre-arrangement to preclude the other party, and carry the election as it was carried, (and I think they are all entitled to their full acquittal on that score), did the returning officer honestly and fairly do his duty? Was it fair to have opened the proceedings till it was beyond question whether it was really twelve o'clock? Was it fair to open the proceedings in presence of two or at most three electors and make no effort to let it be known outside that he was about to open his proceedings? Why were not his proceedings entered in his book as a deliberate act and as his duty required? His attention was called to the impression which his apparent blank book created, by several of the deponents. He passes this unnoticed, and I may fairly assume there was no entry made at the time. He took the trouble to tell Mr Jull when he came in, that he, at least had been nominated. Why did he not tell some of the other party? Why speak to Mr. Jackson and say to him what he does not deny he did say? Why so much anxiety about his watch and the time? Why, when asked by Kelly if any nominations had been made, did he answer, "Yes, lots of them?" Why not say who had been nominated, and why did he give an answer that at least was evasive? He says he does not remember McCarthy asking him if any nominations had been made, nor does he believe he did so, but he remembers his asking, "Have proceedings commenced?" and his replying, proceedings had commenced at twelve, and that he would close the nomination one hour from the last nomination. Why did he not deign to tell him what he told Mr. Jull, that he Jull had been nominated reeve at the opening of the proceedings?

He denies what Fead asserts, but he says among other things that Fead said, he had closed the nomination on his account. To this the returning officer says, "I observed that it would

teach him a lesson, meaning that if ever he offered himself as a candidate, he would cause himself to be nominated within the proper time." How was it his duty to teach by his proceeding a candidate or the electors a lesson? Does not this answer imply the character in which Fead stood as an intended candidate whom the returning officer had taught a lesson by something he had done. Was it fair to make no announcement at any time as to how the proceedings stood until by his declaration he had precluded any further nominations? Can any one say that justice was done to the electors on this occasion? On reading all the affidavits and all the explanations, I confess I arrive at the conclusion, that the election was arrived at by conduct of the returning officer not in accordance with law and contrary to justice.

The defendants contention was, that this was not a case to which our statute applied, that it was one under the statute of Anne, because they say, the relator was not a candidate or voter, within the meaning of sec. 103 of the Municipal Act. I think he was. The relator was known to be a candidate, was there to be proposed, was in fact proposed, although after the declaration by which the returning officer assumed to preclude him. It cannot be permitted that a re-returning officer shall by his own illegal act divest a relator of his *status* as a candidate, nor can the defendants who adopt that act, strip him of the character which gives him right to maintain his *quo warranto* against them.\*

But the other defendants with full knowledge of all he did, adopted his declaration as an election by acclamation, and, excepting McNabb, who disclaimed, they took their seats.

I feel compelled to declare the election void, and I award the relator costs against the returning officers, and the defendants who have maintained their right to the seats.

## COMMON LAW CHAMBERS.

### DONNELLY V. REID.

*Plea in abatement—Affidavit of verification—Inferior Court of record—Pleading and demurring to plea in abatement.*

*Quære*, whether the pendency of a prior action in a County Court can be pleaded in abatement to an action in a Superior; but the question was left to be decided on demurrer.

Where the only affidavit of verification of a plea in abatement was made by the attorney for the defendant (in both actions), an application to set aside the plea was refused.

Application for leave to reply and demur to a plea in abatement refused.

[Chambers, March 6, 10, 1869.]

To an action for work and labour the defendant pleaded in abatement, that an action was pending in a County Court between the same parties for the same cause of action. This plea was verified by the affidavit of the attorney for the defendant in both actions, who swore "that the plea hereunto annexed is, I am informed, and do verily believe, true in substance and in fact."

The plaintiff obtained a summons calling on the defendant to shew cause why this plea should not be set aside and struck off the files upon the following grounds: 1st That the pendency of an action in an inferior Court for the same cause

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of action cannot be pleaded in abatement 2nd. That it appeared from the particulars of claim in this action that an amount is claimed beyond the jurisdiction of the County Court, and therefore the County Court action cannot be for the same cause of action. 8rd. That the affidavit of verification of said plea was insufficient in substance. 4th. That the affidavit of verification should have been made by the defendant and not by the attorney.

Cause was shewn, and it was contended for the defendant,

1. That the term "Inferior Court, so far as this objection is concerned, does not apply to our County Courts, which are Courts of Record: *Laughton v. Taylor*, 6 M. & W. 695; *Grant v. Hamilton*, 8 U. C. C. P. 422.

2. Affidavits were filed contradicting second ground.

3. That the affidavit of verification may be made by a third person: *Tinsley v. Foster*, Burr. 344; *Chitty's Arch.* 12th ed. 914.

At all events the plea had to be filed within four days, and there would not have been time to get affidavits from defendant, and it is not the practice to enlarge the time for pleading in abatement, such pleas not being favored: *Jennings v. Webb*, 1 T. R. 279.

*Harrison, Q. C., contra*, referred to 4 & 5 Anne, cap. 16, sec. 11; *Onslow v. Booth*, 2 Str. 705; *O'Loughlin v. McGarry*, 2 Leg. Rep 110; *Brunner's Digest*, 1614; *Coleman v. Grady, Smythe*, 155; *Chit. Arch.* 12th ed. 915; *Grant v. Hamilton*, 8 U. C. C. P. 426.

GWYNNE, J.—Independently of *Grant v. Hamilton*, 8 U. C. C. P. 422, I would not, upon a motion to set aside a plea in abatement for irregularity, grant an order to set it aside upon the ground that the prior action is stated to be pending in a County Court, which, although an inferior court, is still a court of record. But in view of that case, although it is not the point decided, the opinion of Chief Justice Macaulay appears to be, that it would not be a good objection on demurrer. If plaintiff desires to raise that question he must do so on demurrer.

As to the 2nd point, that the plea is not supported by a sufficient affidavit. By the Stat. 4 & 5 Anne, c. 16, s. 11, it is enacted, that no dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, or show some probable matter to the court, to induce them to believe that the fact of such dilatory plea is true; and in 2 Saun. 210, in note, it is said, it is not necessary that the affidavit should be made by the party himself, if it be made by his attorney it is sufficient.

Now the defendant's counsel in this case, who is also his attorney in the action brought in the court below, undertakes to swear, from the information furnished to him as an attorney in both suits, that he verily believes the plea to be true in substance and in fact. It was contended before me that no one but the defendant himself could make the necessary affidavit. There is authority against this contention. No case was cited to show that assuming the attorney could make the affidavit, the frame of the one made in this case was insufficient.

In *Pearce v. Davy*, 1 Lord Kenyon. 864, an action of trespass was brought for breaking and spoiling certain fishing nets of the plaintiff, by throwing a grapple against it. The defendant pleaded in abatement, because the nets were certain large nets fastened together, called a pilchard seine net, and the plaintiff had no property in them, but jointly with sixteen others, naming them, who are still living, to wit, in A. in the County of Cornwall, and not joined with the plaintiff in the action. This plea was supported by two affidavits, the first made by one of the defendants, sworn after process served, but before declaration filed; and he swore that from the first setting up of the old pilchard seine, he had been, and still was, a proprietor of a thirty-second share therein, and the plaintiff of an eighth, and several other persons (not naming them) of different shares therein, some an eighth, others a sixteenth, &c.

The other was an affidavit of one Paslow, who swore he believed the above affidavit to be true, and that the nets therein mentioned were the same as were mentioned in the declaration, and that he believed the defendant was entitled to a thirty-second share therein.

A rule nisi was obtained to set aside the plea for defects in the affidavit: 1. That the first affidavit being before declaration could not be looked at, but if it could, it was defective in not identifying the nets to be the same; 2. In not mentioning by name who the other several part-owners were, which it was insisted must be done in order to give the plaintiff a better writ. 3. That the second affidavit was founded on belief only. The court set aside the plea, because it was not verified so as to give the plaintiff a better writ, by setting out the names of the part-owners, but it was agreed that there was enough to induce them to believe the truth of the plea.

This is the only case I have been able to find upon this point, whether or not a person, other than the defendant, making the affidavit must swear positively to the truth. A defendant making the affidavit might properly perhaps be held to greater strictness than his attorney. In the absence of any more express authority, I do not feel disposed to say, where the defendant's attorney in both actions declares upon oath that he verily believes that the causes of action are the same, and in the absence of any affidavit on the part of the plaintiff—that probable matter to induce me to believe that the fact of the plea is true is not shewn. If it is clear that the necessary affidavit may be made by the attorney, information and belief is all that he could well speak from. I do not think, therefore, I should set aside the plea on this ground. As to the other objections suggested to the plea, these are more proper to be considered on a demurrer, if the plaintiff thinks fit to demur, than upon a motion to set aside the plea.

As to the plaintiff's application, in case the plea should not be set aside, to be allowed to reply and demur, I shall not grant it; for if, which perhaps admits of doubt, I have authority to grant leave to demur and reply to a plea in abatement, I certainly shall not exercise it to cause a double trial of such a plea. The judgment in favour of a defendant on a demurrer to the plea would be that the writ should be quashed. To

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what end then should the truth be enquired into, which if also established for defendant, would lead to the same judgment; whereas if the plaintiff succeeds on demurrer the judgment is *respondet ouster*. With such results to be attained before the merits are approached, I would not, though I could, authorize the two modes of trial. The order will be to discharge the summons with costs.

*Summons discharged with costs.*

## ENGLISH REPORTS.

### EXCHEQUER CHAMBERS.

#### MORTON AND OTHERS V. WOODS AND OTHERS.

*Mortgage—Landlord and tenant—Attornment by mortgagor—Estoppel—Distress—Statute of Frauds, 29 Car. 2, c. 3—Bills of Sale Act, 17 & 18 Vic. c. 36.*

A mortgagor in possession executed a second mortgage to the defendants, in which the prior mortgage in fee was recited.

By the second mortgage he attorned, and became tenant to the mortgagees, their heirs and assigns, of the premises thereby conveyed, for the term of ten years, if the security should so long continue.

The mortgage contained a proviso that the mortgagees, their heirs, executors, administrators or assigns, might re-enter at any time without demand, and determine the term of ten years, it was executed by the mortgagor, but not by the mortgagees.

The mortgagor continued in possession, and the defendants subsequently distrained for a year's rent.

*Held*, that by the Statute of Frauds, 29 Car. 2, c. 3, the instrument, not having been executed by the defendants, created an estate at will only; and further, that the intention of the parties, as gathered from the deed, was to create that estate, and not a lease for ten years, and that it was therefore immaterial that the deed had not been executed by the defendants.

*Held* also, that although it was apparent upon the face of the instrument that the mortgagor had no legal reversion which he could assign to the defendants, he having agreed to become tenant to them, was estopped from denying that they had the reversion, and that the distress was therefore valid.

*Semble*, that a mortgage which includes personal property is not within the Bills of Sale Act, 17 & 18 Vic. c. 36.

[Ex Ch., 17 W. R. 414.]

Appeal from a judgment of the Court of Queen's Bench for the defendants upon a special case.

Reported 16 W. R. 979, L. R. 3 Q. B. 658.

The question, which depended upon the construction of a mortgage-deed, was whether a distress made by the defendants, the mortgagees, upon certain chattels alleged by the plaintiffs to be their property as creditors' assignees of the mortgagor, was a valid distress.

The material portions of the deed will be found in 16 W. R. 979.

Feb. 2, 3.—*Joshua Williams, Q. C. (Manisty, Q. C., and Hugh Shield with him)*, for the plaintiffs, contended,—1. That the parties did not, on the true construction of the deed, intend to create an estate at will, but a term of ten years; that the deed not being executed the term was not created, and there was no rent incident to the term, and no right of distress. 2. That the defendants were estopped from denying the recital in the deed, from which it was apparent that the mortgagor possessed only an equity of redemption, and not a legal reversion, which he could convey to the defendants, and that the mortgagor was not estopped from denying that the defen-

dants had a legal reversion, and that there was a tenancy—that being apparent upon the face of the deed. 3. That the transaction was an evasion of the Bills of Sale Act, 17 & 18 Vic. c. 36. In addition to the authorities cited in the Court below, he referred to Bacon's Ab. Leases, Co. Litt. 576; *Diadale v. Isles*, 2 Lev. 88; *Newport's Case*, Skin. 481; *Penhorn v. Souster*, 1 W. R. 486, 8 Ex. 188, 768; and *Saunders v. Merryweather*, 18 W. B. 814, 8 H. & C. 902.

*Kemplay*, for the defendants, was not called upon.

KELLY, C. B.—The question upon this special case is, whether the distress made by the defendants can be legally supported. It has been contended by the plaintiffs that it cannot, upon the ground that the defendants had no legal estate in the premises, as the mortgagor had only an equity of redemption when he mortgaged to them, and no legal reversion which he could convey to them; and that consequently there was no rent incident to that reversion for which a distress could be made. It has been contended further, that when the terms of the deed are examined, it will appear that the relation of landlord and tenant was not created between the parties. The contention is put upon two grounds: first, that if any tenancy was contemplated by the deed, it was a tenancy for ten years, and that the deed not having been executed by the defendants, was inoperative, and created no such tenancy; and secondly, that the power of re-entry does not convert the intended lease for ten years into a mere tenancy at will, and that there was therefore no tenancy at all, and no right to rent. This argument is highly technical, but notwithstanding it must, if it is the law, be supported. The objection that the defendants had no legal estate, is correct in point of fact: that may be said of all cases where a tenancy is created by estoppel; but it becomes of primary importance in the present case, because it is argued that this tenancy, if a tenancy at all, is so only by estoppel, and that there can be no estoppel when the truth appears upon the face of the instrument itself upon which the question arises. Now it doubtless does appear upon the face of this instrument that the defendants are not legally seised of the premises, but that the legal estate was, at the time of the conveyance to them, outstanding in the first mortgagee. In support of the proposition numerous cases have been cited, but looking at the facts of those cases, and the *rationes decidendi*, it appears that they are not in point. They are either actions of covenant, or, in one case, an action of ejectment on a clause of re-entry, where it is clear that the plaintiff must fail unless he has the legal interest, and accordingly the action was held not to be maintainable. But if the authorities referred to go the length of deciding that when the truth appears there is no estoppel, they must be taken to be overruled by *Jolly v. Arbutnot*, 7 W. R. 582, 28 L. J. Ch. 547, decided on appeal by Chelmsford, L. C., and binding upon us as a court of co-ordinate jurisdiction. There it was manifest upon the deeds that the receiver had no legal estate and no interest in the premises. The decision of the Master of the Rolls (7 W. R. 127, 28 L. J. Ch. 274) was in accordance with the proposition contended for by the plaintiffs,

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but his judgment was reversed by the Lord Chancellor, who held that there had been a tenancy created by the attornment of the mortgagor to the receiver, and that although the receiver had no other interest in the property, that fact did not destroy the tenancy and the power of distress annexed to it. "It is contended," he says, "that the attornment of Aplin had no operation,—not by agreement, because he had no interest in the land to which it could apply, nor by estoppel, because the deed sets forth the rights and interests of all parties, and shows therefore that he had no reversion in the premises to which the power of distress would be incident. It appears to me, however, that the truth of the case appearing by the deed is a reason why the agreement between the parties should be carried into effect, either by giving effect to the intention of the parties in the manner they have prescribed, or by way of estoppel to prevent their denying the acts they have authorised to be done. If the attornment to the mortgagee would be good to create a tenancy in the mortgagor, which seems to be provided for by the 11 Geo. 2, c. 19, why should not an attornment to a third person with the consent of the mortgagee operate to create a tenancy, or to estop all parties from denying that such a tenancy exists? The statement in the deed of the character in which Aplin was to be clothed in order to carry into effect the object of the parties, and the proof it affords of his having no previous title in the land, appears to me to furnish no sufficient objection to the validity of the distress in question." There is a distinction between that case and the present; for in it the mortgagor and mortgagee, as well as the receiver, were parties, and the attornment was with the consent of the mortgagee, while here the prior mortgagee is not a party. That distinction is relied upon by Mr. Williams, but it is manifest that the relation of landlord and tenant was created, and it is upon that relation, and not upon the consent of any third party, that the right of distress depends. The cases then may be said to be identical, and upon this point we are bound by authority to hold that although the facts appear upon the face of the instrument, the relation of landlord and tenant is not affected, and the right of distress exists.

The next question is, whether the deed creates any tenancy at all; and it is insisted upon the part of the plaintiffs that if there is any tenancy it is for ten years, and that that being the intention of the instrument it is void as a lease for that term, for want of execution. To that it is answered by the defendants that by the Statute of Frauds (29 Car. 2, c. 3, s. 1), a lease for ten years not in writing shall not be absolutely void, but shall have the effect of an estate at will. It is also contended that as the parties intended to grant a lease for ten years, it is contrary to that intention to hold that an estate at will was created. That might perhaps be so in an ordinary case of a mere lease for years between landlord and tenant, but this instrument is a mortgage, and these further provisions which relate to the tenancy are all meant as a further security for the repayment of the interest, and the intention of the parties must be gathered from the whole instrument. It is not repugnant to the relation

of mortgagor and mortgagee that the tenancy should last for ten years, and so in the first instance that term is mentioned; but then follows the power of re-entry, and it is clear that whatever the nominal duration of the tenancy, if it is in the power of the landlord at any time to enter and put an end to the tenancy by taking possession of the premises, the estate is only an estate at will. It is said that an estate at will cannot last beyond the life of the lessor, and that it was contemplated by this instrument that the mortgagor might continue tenant to the heirs, executors and administrators of the defendants. The law upon this subject is beset with subtle distinctions, but it would rather seem to be the rule that such a tenancy may last after the death of the lessor, unless he shows an intention to determine it in his lifetime. However this may be, the mere circumstance that the power of re-entry is reserved to the heirs, executors and administrators, is not of itself necessarily of effect to prevent the estate from being an estate at will. But, in any view of the case, the Statute of Frauds puts an end to the question; for as the deed was not executed, and the term created by parol only, the tenancy becomes, by the express words of the statute, a tenancy at will. I think, moreover, that upon the true construction of the instrument a tenancy at will was created: although the mortgagee did not execute it, he assented to it, and advanced money upon its execution by the mortgagor.

A point has been made upon the Bills of Sale Act (17 & 18 Vic. c. 86), and it is objected that this instrument is a bill of sale within the meaning of that act, and is therefore void for want of registration. But the court has in this case no power of drawing inferences of fact, and, even if this amounts to an evasion of the act, has no power as a jury to come to that conclusion. I may, however, observe that if this instrument is a bill of sale, every mortgage deed which included personal property, and contained a clause of re-entry, would require registration, and it is evident that no such doctrine could be supported. For these reasons I am of opinion that the judgment of the Court of Queen's Bench is right, and should be affirmed.

CHANNELL, B., BYLES, J., KEATING, J., and CLEASBY, B., concurred.

*Judgment affirmed.*

## QUEEN'S BENCH.

REG. V. RUSSELL.

*Quo warranto*—Clerk of the peace—1 W. & M. c. 21, s. 6—*Misdemeanour in office*—Decision of Court of competent jurisdiction—Weight of evidence.

The Court of Queen's Bench cannot review the decision of an inferior tribunal on a matter within its jurisdiction, and on which it has heard evidence and arrived at a conclusion.

Where a charge was preferred to a Court of Quarter Sessions under 1 W. & M. c. 21, s. 6, against a clerk of the peace for a misdemeanour in his office, and evidence was taken, and the Court decided that the charges were proved, and dismissed the clerk of the peace from his office and appointed another person in his place.

*Held*, on a *quo warranto* information against the person so appointed, that the sufficiency of the evidence was a question entirely for the Court of Quarter Sessions, and the decision of that Court could not be reviewed by the Court of Queen's Bench.

[Q. B. 17 W. R. 402.]

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This was an information in the nature of a *quo warranto* on the relation of Mr. Henry Atkinson Wildes exhibited against Mr. Francis Russell, and calling on him to show by what authority he claimed to be clerk of the peace for the county of Kent.

The case now came before the Court on a special verdict found at the trial of the information.

The return to the information set out that H. J. Wildes, was clerk of the peace for the county of Kent, and that a complaint and charge in writing were duly exhibited against him of having misdemeaned himself in the execution of his office, and at a Quarter Sessions of the Peace duly holden on the 23rd of May, 1865, upon examination and due proof of the said complaint and charges, and in his presence and hearing, and on hearing what was alleged and insisted upon by and on his behalf, an order was duly made by the last mentioned Court of Quarter Sessions, and entered on record, and still remained in full force and effect.

This order set out formally, the charges of misdemeanour in his office against Mr. Wildes, which consisted in his refusal to record an order which it was his duty to record made by the Court of Quarter Sessions for payment of a sum of £169 16s. 6d. to Frederick Scudamore for professional services rendered as an attorney-at-law, and also to draw up, sign and deliver to the county treasurer, an order for payment of such sum to Mr. Scudamore. The order then stated the exhibiting of these charges in writing, and their delivery to Mr. Wildes: the holding of courts to adjudicate on the charges and the various adjournments until such 23rd day of May, 1865: the due hearing and proof of such charges and examination of witnesses, and the hearing of the defence.

The order then set out the finding of the court that the charges were duly proved and true, and that Mr. Wildes had been duly proved to be and was guilty of the several misdemeanours in the execution of his office in the complaint and charges alleged, and his discharge by the Court of Quarter Sessions from his office of the clerk of the peace for the said county, pursuant to the statute in such case made and provided. The return then set out the fact of the discharge of H. A. Wildes, under this order, and the due appointment of F. Russell to the vacant office of clerk of the peace.

The replication alleged that there was not before or at the said Court of Quarter Sessions holden on the 23rd May, 1865, any proof or evidence of the complaint and charges as in the plea alleged.

The case came on for trial before the Lord Chief Justice, and a special jury, when it was agreed that a special verdict should be found, from which the following statement of facts is taken, it having been agreed that no other objection was to be raised on the information except that specified in the rule *nisi* for the information, which was to the effect that there was no evidence before the justices who made the order for the discharge or dismissal of the said H. A. Wildes, that he had absolutely and contumaciously refused as alleged in the complaint and charges.

At the Quarter Sessions held on the 23rd May, 1865, certain documents were put in evidence, among others, a report of the finance committee, in the year 1863, asking for power to take proceedings in respect of certain transport fees received by the clerk of the peace, and an order thereon by the Court of Quarter Sessions. Also a subsequent report by the finance committee relating to these fees retained by the clerk of the peace, and recommending that the amount of such fees should be demanded of the clerk of the peace.

Other documents were also put in, from which it appeared that further proceedings were then had, and at a court held on the 12th of April, 1864, the court of Quarter Sessions refused to make an order for the payment of a quarter's salary alleged to be due to H. A. Wildes, together with certain other payments made by him amounting in the whole to £228 9s. 4d., on the ground that they were entitled to set-off against that amount the sum £229 10s. retained by him on account of the transport fees. H. A. Wildes who claimed these fees as his own right thereupon applied to the Court of Queen's Bench for a *mandamus* to compel the payment of his salary. Frederick Scudamore, above named, was employed as county solicitor in resisting this application, which resulted in a decision of the Court of Queen's Bench that the transport fees were included in the salary of the clerk of the peace, but that only a portion was recoverable and could be set-off. The rule was thereupon discharged upon terms. The bill of charges of Mr. Scudamore incurred in respect of these proceedings was as follows:—

“The Justices of Kent to Frederick Scudamore.

“Professional services rendered, and money paid on account of the general business of the county from the 23rd November, 1863, to 2nd December, 1864, the particulars of which have been delivered to the finance committee and approved by them, £169 16s. 6d.

“FREDERICK SCUDAMORE.”

This document was marked on the back with the initials of two justices, members of the finance committee, and with the words “seen and allowed” in the handwriting of a clerk of the said H. A. Wildes, and with the signatures of three justices of the peace who were present at the Court of Quarter Sessions on the 10th day of January, 1865, on which day it was with other bills sent in by the finance committee to the sessions and included in the finance report of the committee recommending the payment of bills. The chairman of the Court in the usual manner gave a verbal order for the payment of the bills, which were thereupon paid by the county treasurer, without any formal order being drawn up, and then sent to H. A. Wildes for the purpose of having such order made out. On the 24th of January, 1865, H. A. Wildes wrote a letter to the chairman of the Court of Quarter Sessions stating that the bill had not been presented in the usual manner by the finance committee, but that only a short note had been presented, and that he considered it his duty “not to enter in the proceedings of the Court an order for the payment of this bill, but to report to the next Court of General Sessions on the subject.”

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This letter was answered on the 26th January by Mr. Scudamore, on behalf of the chairman, in a letter which stated that the bill having been specially brought under the notice of the Court, and signed by three justices present, in the usual manner, the order for payment had been regularly made, and that he had been directed by the chairman to require that it might be recorded. To this letter Mr. Wildes replied on the 28th January, stating that for the reason mentioned in this previous letter he must decline to record the order.

At a Court of General Sessions held on the 18th March, 1865, Mr. Wildes read a report in which he stated his reasons for having declined to record the order, and it was then ordered that it be "referred to the finance committee to take such measures as they shall think right in respect of the refusal by the clerk of the peace to enter on the proceedings of the court an order made by the last court for the payment of the said bill, and that the said report of the clerk of the peace be handed by him to the finance committee."

A demand in writing was made on Mr. Wildes by the county treasurer for a certificate of the order of court which was declined by Mr. Wildes on the ground that the order was not a valid one, but illegal.

The finance committee, after having taken the opinion of counsel on the question, gave instructions to Mr. Scudamore to prepare charges against Mr. Wildes for having committed a misdemeanour in his office, under 1 W. & M. c. 21, s. o. These proceedings were instituted in the name of the county treasurer.

The charges were heard on the 23rd May, 1865, and evidence taken, and the case gone into on both sides. The evidence was set out in the special verdict, and consisted among other things of the examination of a shorthand writer, who deposed that on the 18th of March the clerk of the peace was asked by the chairman "I understand you still refuses to enter the order," and replied "yes." At the conclusion of the hearing, on the 23rd May, the order was made by the court, which is above set out, dismissing Mr. Wildes from the office of clerk of the peace.

*M. Chambers*, Q.C. (*Gates* with him), for the relator, contended that on the facts there had been no absolute refusal to comply with the order, that there had at least been no contumacious refusal, and that there was no evidence on which the finding of the Court of Quarter Sessions could be supported. He supported his argument by contending that as the complaint must, by the Act, be in writing, it is incumbent that the court, acting on that complaint, should have specific proof of the written allegation, and that when the Court of Queen's Bench found that there was not before the inferior tribunal any evidence directed to the specific charge, they would review the finding.

*Mellish*, Q.C. (*Pollock*, Q.C. and *Archibald* with him), for the defendant.—The questions are twofold, first whether the court can look into the evidence to see whether the finding of the court below was warranted, and next, if they can, whether it was in fact warranted. Now here the Court of Quarter Sessions were bound to hear the case. If they, in the course of it, did

anything contrary to natural justice, their jurisdiction would cease just as jurisdiction may cease in the case of justices when title to land comes in question. But nothing has happened to take away their jurisdiction. They are to determine both the law and the fact: first, that there is in point of law some evidence, and next, as jurymen, the sufficiency of that evidence. [*COCKBURN*, C. J.—You admit that the charge must be for a misdemeanour in his office; is it not within our jurisdiction to determine whether that has arisen?] Yes, but the moment the jurisdiction is found to exist they have full authority over the entire charge: *Flanigan v. The Overseers of Bishop Wearmouth*, 6 W. R. 88, 8 E. & B. 451; *Wildes v. Russell*, 14 W. R. 798, L. R. 1 C. P. 722, and *Kemp v. Neville*, 10 C. B. N. S. 523. A departure during the hearing from natural justice might be impeached by *certiorari* even if it did not at once oust the jurisdiction, for instance, not hearing the parties would be not hearing the case, and this court would interfere by *mandamus*: *Duchess of Kingston's case*, 2 Sm. Lead. Cases 679; but if the inferior tribunal has acted within their jurisdiction their decision cannot be impeached. They had jurisdiction here, there was evidence, and they heard the parties, and nothing having happened to oust their jurisdiction their decision is final. The replication has traversed the plea which alleges "due proof," that is, proof that the Court of Quarter Sessions considered due, and as on a special verdict the court gives judgment on the whole record, the defence is entitled to judgment.

The following cases were also referred to: *R. v. Bolton*, 1 Q. B. 66; *R. v. Graddon*, Cowp. 315; *R. v. J.J. Cheshire*, 8 Ad. & E. 398; *Ex parte Hopwood*, 19 L. J. M. C. 197; *Coster v. Wilson*, 8 M. & W. 411; *Aldridge v. Haines*, 2 B. & Ad. 395.

*Chambers*, in reply.

*COCKBURN*, L. J.—This is a proceeding by way of a *quo warranto* to try the defendant's title to the possession of the office of clerk of the peace for the county of Kent. The return to the writ makes the following statement of facts:—The relator was in possession of this office, and whilst so in possession, a charge was made against him of having been guilty of a misdemeanour in that office in refusing to record an order made by the Court of Quarter Sessions, which it was his duty as clerk of the peace to record, and that thereupon a written complaint having been preferred against him, the Court of Quarter Sessions having competent jurisdiction to inquire into the matter, found that he had misdeemeaned himself in his office, and dismissed him from it, and therefore the office being vacant, the defendant was appointed to it, and was entitled to retain it. The case comes before us as a special verdict, by which we are bound, and on the argument two grounds are taken by the defendant in support of his right to the office. The first is, that the Court of Quarter Sessions having competent authority to entertain the charge against the relator—a charge which if established was a sufficient cause for turning him out of the office—and having received a written charge, and having heard evidence thereon, and heard the parties, and delivered their judgment, it is not competent

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for this Court to review the judgment, and determine whether it was warranted by the evidence, and secondly, that if it were competent for this Court to enquire into the matter, then that on this special verdict, it appears that, in fact, there was evidence on which the Court of Quarter Sessions were justified in acting. On the first point, the argument of Mr. Mellish has quite satisfied my mind that the defendants contention is right. It seems to me to be impossible to question that the Court of Quarter Sessions had competent jurisdiction, the Act of Will. 3, expressly gives it to them, but we are entitled to look to see if the complaint made against the relator amounts to a misdemeanour in his office, and I am very clearly of opinion that it does. I agree with Mr. Justice Willes that "if the justices were to make an order, which they thought right, and which the clerk of the peace, after remonstrance had failed to satisfy them it was wrong, still refused to act on, that would clearly amount to a misdemeanour." I agree also with the counsel for the relator that, if Mr. Wildes *bona fide* thought that the Court of Quarter Sessions were doing something illegal and unjustifiable, and if he entertained a belief that when their attention was called to it, the Court would rectify the error, it would be his duty to point out to the Court the mistake into which he supposed them to have fallen, and a mere delay or strong remonstrance would not amount to a misdemeanour. But if from the outset he determines that whether the Court agree with him or not he will not comply with their order, or when he perseveres in disobedience to it after he has brought the matter before them, then I agree with Mr. Justice Willes that the proper course being to leave it to the Queen's Bench to say whether the order was right, the clerk of the peace would be setting himself up as superior to the justices and master, and would be guilty of a misdemeanour. There was, therefore, in my opinion before the Court of Quarter Sessions, an offence charged, which, if proved, gave them authority to dismiss the relator. That charge was brought before the Court, in writing, as required by the Act of Will. III., and from what happened at that and the subsequent Courts as appears by the special verdict, I cannot doubt that there was evidence brought before the Court, and inquired into, going to the question whether there had been a misdemeanour on the part of the relator in his office. On this state of fact, and without expressing as yet any opinion as to whether the evidence warranted the Court in coming to the decision at which they arrived, there arises this question—whether it is open to this Court to inquire whether the Court of Quarter Sessions were warranted in coming to the conclusion at which they arrived. I am of opinion that it is not so open to us. The rule is well established in cases of summary convictions. As to everything which relates to jurisdiction this Court will interfere to regulate, and set right inferior tribunals, but when once we find that there is jurisdiction, this Court will not take upon themselves to say whether the decision actually arrived at, is that which this Court would have come to. It may be that something may happen in the

course of a case which is inconsistent with what has been called natural, but what I prefer to call rational justice—such as the refusal to hear a party—and then this Court will interfere; but, unless something of the sort appears, we should not enter into the merits of the case. Applying this to the still stronger case of a Court of Quarter Sessions, which is a court of record, when we find—as we do here—that the charge is one over which the Court have jurisdiction, that the provisions of the statute have been complied with, and a written charge exhibited, that there has been proof in open court and an opportunity to the person charged to defend himself, and thereupon a decision—we cannot interfere because we may be dissatisfied with that decision, and should ourselves have arrived at a different one. This case is somewhat different from the one that was before the Court of Common Pleas, for that was an action for the fees of the office received by the defendant, and in that case the answer was that the claim could not be entertained, because the claimant was not in the office, and the court could not enter into the question whether his removal from it was right or wrong: the court could not go behind the judgment. But so here; unless we find that the Court of Quarter Sessions has proceeded wrongfully and illegally, we cannot go behind the judgment. If this court has any jurisdiction over such a court of record other than that I have pointed out, it would be, I think, by *certiorari*, but on this enquiry we cannot go into the question whether the relator has been properly removed on the evidence adduced before the court below.

I feel, however, bound to add that, after the most careful consideration that I can give to this case, I am myself satisfied that Mr. Wildes—for some motive which I will not enter into, whether of discharging his duty, or from angry feeling, or otherwise—did in fact refuse, and absolutely refuse, to obey the order of the court. The evidence satisfies me on this point, and that on this the contention of the defendant is also right. I think the conclusion from the evidence is fair, that he had made up his mind that the order was illegal, and that he would not enter it; that, in pursuance of this resolution, he did refuse, and that in this he committed a misdemeanor in his office. The conclusion, then, is, that the pleas are sufficient, and that our judgment should be for the defendant.

HANNEN, J.—I have nothing to add, except to express my concurrence on both points. It is not competent to us to inquire into the grounds on which the Court of Quarter Sessions arrived at their decision, and I may further say that I entirely agree, if it were competent for us to inquire into the evidence, I myself should come to the same conclusion, that there was a refusal by Mr. Wildes which amounted to a misdemeanor in his office.

HAYES, J., concurred.

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## COMMON LAW.

REG. v. JOHN TAYLOR.  
REG. v. CANWELL AND DUNN.*Misdemeanour—Common assault.*

Upon a count for unlawfully and maliciously wounding, or on one for unlawfully and maliciously inflicting grievous bodily harm, a prisoner may be convicted of a common assault.

[C. C. R., W. R., 623.]

Case:—The prisoner, John Taylor, was indicted at the Easter General Quarter Sessions, 1869, of the North Riding of Yorkshire, for a misdemeanour upon an indictment, of which the following is a copy:—

North Riding of Yorkshire, to wit: The jurors for our lady the Queen, upon their oath present that John Taylor, on the third day of January, in the year of our Lord one thousand eight hundred and sixty-nine, unlawfully and maliciously did wound one Thomas Meek.

And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year aforesaid, the said John Taylor did unlawfully and maliciously inflict grievous bodily harm upon the said Thomas Meek.

Upon this indictment the jury returned a verdict of "guilty of an assault."

The counsel for the prisoner contended that the prisoner could not be convicted of a common assault on that indictment, and therefore that the verdict amounted to an acquittal.

The Court thereupon postponed judgment and reserved the question of law for the consideration of the justices of either bench and barons of the Exchequer, viz.:

Whether this conviction can be sustained?

In the meantime the prisoner was admitted to bail to appear at the next Court of Quarter Sessions of the North Riding of Yorkshire to receive judgment, if called upon.

JOHN R. W. HILDYARD, *Chairman*.

*Shepherd* for the prisoner. The question is, whether the prisoner can be convicted of a common assault upon this indictment, which neither expressly charges a common assault nor mentions the word "assault" in either count. The offence charged is a misdemeanour only, and whenever a count charges a misdemeanour of a high character, which in its nature includes a lower one, it is within the province of the jury to convict of the lower. In *R. v. Oliver*, Bell C. C. 287, 9 W. R. 60, it was held that upon a count for assaulting, beating, wounding, and occasioning actual bodily harm, there might be a conviction for a common assault; and in *R. v. Yeadon*, L. & C. 81, 10 W. R. 64, where an indictment contained a count for an assault occasioning actual bodily harm, under 14 & 15 Vict. c. 100, s. 29, and the jury returned a verdict of guilty of a common assault, which the judge declined to receive, as illegal, and the jury thereupon found a general verdict of guilty, this court awarded a *venire de novo*. It is true that in those cases the word "assault" is introduced in the counts; but that is not a technical word which it is imperative to use in a count in order to support a conviction for an assault. Every battery includes an assault: 1 Hawk. P. C. 110, *R. v.*

*Ingram*, 1 Salk, 884. Here the charge of wounding includes that of assaulting. If this conviction is held to stand, a special verdict of guilty of a common assault would be entered upon the record.

No counsel appeared for the prosecution.

KELLY, C. B.—This conviction must be affirmed; although the word assault is not mentioned in either of the counts, the charge in each of them includes it, and both on principle as well as having regard to the language used, we think this conviction must be supported. In *R. v. Yeadon*, *supra*, it is observed by more than one learned judge that the first finding of the jury of a common assault was unobjectionable, and Wightman, J., says the chairman in that case substantially misdirected the jury. It is true that there the word assault occurs in the count; but the count charges a higher description of assault, and the principle is the same whether the word is used or not. In *R. v. Canwell*, the conviction must be affirmed for the same reasons.\*

The rest of the Court concurred.

*Conviction in both cases affirmed.*

## CHANCERY.

PAGE v. WARD.

*Practice—Production of documents—Privileged communication—Architect.*

The plaintiff had in her possession or power letters which had passed between her solicitor and an architect, having reference to the questions in the suit, but not written in contemplation of legal proceedings. Held, that she was bound to produce them.

[V. C. M., 17 W. R. 435.]

Adjourned summons.

This suit related to a parol agreement, under which the defendant was alleged to be a lessee of a portion of Saville House, Leicester-square, the whole of which was destroyed by fire in February, 1865. The plaintiff, Mrs. Ward, was called upon to make the usual affidavit as to documents in her possession.

By her affidavit, she admitted she had in her possession or power certain letters which had passed between Mr. Marsh Nelson, her architect, and her solicitors, which had reference to the questions in this suit. The affidavit alleged that Mr. Marsh Nelson was the principal witness on the plaintiff's behalf, and all the letters which had passed between him and her solicitors were of a confidential character. Those written by Mr. Nelson to her solicitors were written to them as her professional advisers, and those written by her solicitors to Mr. Nelson were written to him as her professional adviser and architect, and all of them were private and confidential.

Some of the letters had been written before the date of the alleged agreement, others after that date, but before any dispute had arisen, the rest after the dispute had arisen.

\* *R. v. Canwell and Dunn* was a case reserved at the same sessions upon precisely the same point, the jury having found the prisoners guilty of a common assault upon a count charging them with unlawfully and maliciously inflicting grievous bodily harm.



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A summons had been taken out to consider the sufficiency of the privilege set up. The chief clerk was of opinion the documents were privileged, as they were communications with skilled witnesses.

The summons was adjourned into court, and now came on to be heard.

*Davey*, in support of the application.—The affidavit does not state that the letters were written in contemplation of the suit, or that Mr. Marsh Nelson was employed in getting up evidence. No distinct ground of privilege is set up in the affidavit, and if that be not done every document must be produced. He cited: *Simpson v. Brown*, 33 Beav. 482; *Steele v. Stewart*, 1 Ph. 471; *Holmes v. Baddeley*, 1 Ph. 476; *Curling v. Perring*, 2 M. & K. 880; *Walsham v. Stainton*, 12 W. R. 199; 2 H. & M. 1.

*Wickens, contra*.—On the fire taking place every sort of difficulty was likely to arise from the fact of the plaintiff's property being let out among many persons. She very properly employed a solicitor and an architect to settle the conflicting claims. The question as to what is the commencement of litigation does not arise in this case, for every letter written after the fire was clearly written with reference to the litigation which was now arisen.

MALINS, V.C.—It is difficult to lay down any general rule in these cases as to privileged documents, but my impression is that the rule cannot be carried to the extent here contended for. I agree with Mr. Davey that all documents are *prima facie* to be produced, and, as no ground of privilege is set up in this case, I think the documents in question must be produced.

## DIXON V. HOLDEN.

*Injury to reputation—Injunction.*

The court has jurisdiction to restrain by injunction the publication of advertisements injurious to a man's reputation or mercantile credit.

[17 W. R. V. C. M. 482.]

This suit now came on to be heard on motion for decree. An interlocutory injunction had been granted during the Long Vacation, restraining the defendants from printing and publishing the advertisements complained of. The facts were as follows;—

William Dixon, the plaintiff in this suit, up to the year 1851 (when the partnership expired), carried on business at San Francisco, in partnership with Alexander Forbes, and his brothers Hugh Dixon and Launcelot Dixon, under the style of Dixon, Forbes & Co. Hugh Dixon and Launcelot Dixon also carried on a distinct business at Liverpool, under the style of Dixon Brothers, but with this firm the plaintiff had no connection.

In December, 1850, the firm of Dixon Brothers stopped payment, and executed a deed of assignment for the benefit of their creditors; they subsequently incurred further losses, and in December, 1851, became bankrupt.

In the year 1852, the plaintiff returned to England, and in 1857, entered into partnership with Hugh Dixon and Launcelot Dixon, under the style of William Dixon & Co.

The defendants acted as solicitors to the assignees in bankruptcy of Dixon Brothers, up to the year 1854, when other solicitors were appointed.

In the year 1867, the defendant, J. Holden, wrote letters to Hugh Dixon threatening, *inter alia*, to advertise some acceptances given by him prior to his bankruptcy as old assets; the purpose of these letters being, as the bill alleged, to extort money.

In September, 1867, the defendants inclosed and forwarded to Hugh Dixon, at the offices of William Dixon & Co., a printed notice, requesting the creditors of Dixon Brothers to meet at a certain time and place, for the choice of a new assignee, and to be consulted as to the assets, "and also on there being two additional solvent partners, William Dixon and Alexander Forbes, both formerly of California." This notice was signed by the defendants.

The plaintiff, considering that this notice, if published, would damage his character and credit, as connecting his name with the insolvent firm of Dixon Brothers, instructed his solicitors to write to the defendants and protest against the issue of such notices. The defendants in reply, stated that they believed the plaintiff and A. Forbes were partners in the firm of Dixon Brothers, and that "the advertisement was intended for as many local papers as there were diverse residence of creditors."

It was to restrain the publication of these advertisements that this bill was filed.

*Little, Q. C.*, and *Proctor*, for the plaintiff, contended that as this advertisement was injurious to the credit of the plaintiff, it was damage in effect to his property, and the court had jurisdiction to restrain its publication. They cited, *Routh v. Webster*, 10 Beav. 561; *Bullock v. Chapman*, 2 De G. & S. 211; *Springhead Spinning Company v. Riley*, 16 W. R. 1188, L. R. 6 Eq. 551. [The Vice-Chancellor referred to *Clark v. Freeman*, 11 Beav. 112.]

*Glasser, Q. C.*, and *Morris*, for the defendants. There is no jurisdiction in this court unless an injury to property results. This is a mere case of libel over which the common law courts have jurisdiction, and in which they can now, if necessary, grant an injunction. Here, however, there is no damage. They referred to *Clark v. Freeman*; *Fleming v. Newton*, 1 H. L. C. 363.

*Little, Q. C.*, in reply.

MALINS, V.C.—In this case there is no evidence that the plaintiff ever was a partner in the bankrupt firm; it was sworn that he was not; but being a merchant of repute at Liverpool, the advertisements stated not only that he was a member of the bankrupt firm, but in substance that being a solvent partner, he had concealed that fact from his creditors. The defendant instead of apologising for this very grave offence, repeats it in an aggravated form. It is admitted that this court has jurisdiction where property is to be affected. But in my opinion the credit and good name of a merchant is part of his property, and he is entitled to have such property protected by injunction. Here, however, there is a distinct allegation, not denied, that the publication of this advertisement will injure the plaintiff's business,

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but had it only referred to his reputation, I am of opinion that this court would also have jurisdiction. It was contended, to my surprise, that in *Fleming v. Newton*, Lord Cottenham had decided that in such a case this court had no jurisdiction, but on referring to that case, I find that Lord Cottenham only expressed an opinion that such jurisdiction should be exercised cautiously. In the case of *Springhead Company v. Riley*, which has never been appealed, I had to consider all the authorities bearing on this question. I apprehend that the case of *Routh v. Webster*, goes the whole length of what is asked here. The next case is *Clark v. Freeman*. I refer to the observation of Lord Cairns upon that case in *Maxwell v. Hogg*, 16 W. R. 84, L. R. 2 Ch. 810, where he says,—"It always appeared to me that *Clark v. Freeman* might have been decided in favour of the plaintiff, on the ground that he had a property in his own name." With this observation I entirely agree. I am of opinion that the original injunction in this case was rightly granted. Has then the subsequent conduct of the defendants mitigated the offence? In their answer and evidence they appear rather to attempt to justify themselves than to apologise. The injunction must, therefore, be made perpetual, and they must pay the costs of the suit. Wherever the publication of advertisements or other documents tend to destroy or deteriorate property, whether tangible or intangible, this court has, in my opinion jurisdiction to interfere, and a man's reputation and mercantile credit is assuredly a most valuable part of his property.

## FEILDEN V. SLATER AND SEFTON.

*Covenant—Practice—Affidavit—Lease—Notice—Construction of covenant—Damage—Parties.*

An affidavit filed on the part of a defendant cannot, in a cause, be read as evidence against a co-defendant. *Lord v. Colwin*, 3 Drew. 222, distinguished.

The rule that a purchaser is bound to inquire into the title of his vendor, and is affected with notice with what appears upon the title if he does not so inquire, applies in the case of a lessee who neglects to inquire into his lessor's title.

*Wilson v. Hart*, 14 W. R. 748, L. R. 1 Ch. App. 463, followed.

A covenant not to use a house "as an inn, public-house, or tap-room, or for the sale of spirituous liquors, ale or beer," is broken by the sale therein of spirits or beer in bottles, though the house is not used as a public-house, and the liquors are not sold by retail, or to be drunk on the premises.

A plaintiff suing for an injunction to restrain a breach of a covenant, is not bound to show any special damage sustained thereby.

A. conveys land to B., which B., by the same instrument, covenants that he will not use or suffer to be used for certain purposes. B. leases the land to C., who uses it for the purposes forbidden by the covenant. B. is not a proper party to a bill filed by A. for an injunction to restrain any further breach of the covenant.

[V. C. J. 17 W. R. 485.]

By indenture of the 25th of April, 1854, John Feilden and Joseph Feilden (the plaintiff) conveyed certain dwelling-houses and shops in the borough of Blackburn to the defendant Slater and three other persons, in equal shares, as tenants in common, reserving a perpetual rent charge of £40 a-year. By the same indenture the purchasers (including the defendant Slater) jointly and severally covenanted with John Feilden and the plaintiff, their heirs and assigns, among other things, that they would not use or

occupy, or permit to be used or occupied, any of such buildings as an inn, public-house, or tap-room, or for the sale of spirituous liquors, or ale, or beer, nor set up or exercise, or cause or suffer to be set up or exercised thereon any business or manufactory which might be detrimental to the neighbourhood.

In the year 1859 the interest of John Feilden in the premises became absolutely vested in the plaintiff.

By a deed of partition, dated 25th February, 1858, the defendant Slater became solely entitled to one of the dwelling-houses and shops in question; and by an indenture, dated 1st November, 1862, the defendant Slater demised the same to the defendant Sefton for a term of twenty-one years; and the same indenture contained a covenant on the part of Sefton to the effect that no offensive business or occupation or nuisance should be carried on or committed on the same premises, and that the same should be used as a dwelling-house or shop only.

About the end of the year 1865, the defendant Sefton, having for several years previously, in the shop in question, carried on the business of a grocer only, was appointed agent in Blackburn of Messrs. W. & A. Gilbey, the wine-importers and distillers of Oxford-street, and in the month of March, 1866, and from that time, he proceeded to sell and expose for sale, in the shop in question, the wines and spirituous liquors of Messrs. Gilbey.

The defendant Sefton continuing to sell wines and spirituous liquors in spite of the remonstrances of the plaintiff and his agents, and of the defendant Slater, the plaintiff, in March, 1868, filed his bill against the defendants Slater and Sefton, praying that they might be restrained from using, or permitting to be used, the dwelling-house and shop in question as an inn, public-house, or tap-room, or for the sale of spirituous liquors, or ale or beer.

The defendant Slater, by his answer, insisted that, whatever might be the nature of the acts charged against Sefton, no case had been made out by the bill against himself.

The defendant Sefton, by his answer, stated that he never sold any wines or spirituous liquors except those of Messrs. Gilbey; that he never sold any for consumption on the premises, nor ever sold a less quantity than a single reputed quart bottle. He also denied that, when he took the lease of the 1st November, 1862, he had any notice of the covenants contained in the indenture of the 25th April, 1854.

The plaintiff filed a replication.

*Renshaw (Kay, Q.C., with him)* for the plaintiff, argued that the defendant Sefton was, upon the facts of the case, affected with notice of the covenants in the indenture of the 25th April, 1854, and, in order to prove this, proceeded to read a portion of an affidavit filed on behalf of the defendant Slater.

JAMES, V.C.—An affidavit filed on behalf of a defendant in a cause cannot be read against a co-defendant.

*Renshaw*, in reply to his Honor, referred to *Lord v. Colwin*, W. R. 842, 3 Drew. 222.

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JAMES, V. C.—That case applies to open public cross-examination. I want an authority applicable to the case of affidavit.

*Renshaw* referred to the observations of the Master of the Rolls, in *Sturgis v. Morse*, 26 Beav. 565, 566: “I apprehend that evidence given for any defendant is evidence for the whole cause, and that the plaintiff may make use of it both in argument or comment. I have known it done repeatedly, and I think that any evidence in the cause may be made use of by the plaintiffs against the defendants, and by the defendants against the plaintiffs.” But even if the defendant Sefton be not affected with notice upon the facts, he is so by construction of law. He ought to have inquired into his lessor's title: *Tulk v. Moxhay*, 2 Phillips, 774; *Parker v. Whyte*, 11 W. R. 688, 1 H. & M. 167; *Wilson v. Hart*, 13 W. R. 988, 2 H. & M. 551, affirmed on appeal, 14 W. R. 748, L. R. 1 Ch. App. 463; *Clements v. Welles*, 14 W. R. 187, L. R. 1 Eq. 200. It would completely paralyze the covenant if Slater were permitted to let the premises to a person who might set the covenant at defiance. Sefton avoids getting notice by not making inquiry, and is therefore guilty of gross negligence. As for the construction of the covenant, we do not desire to restrain the defendant Sefton from selling wines, but we submit that the scope of the covenant ought not to be restricted to the selling of beer and spirituous liquors by retail, but that it ought to receive a reasonably liberal construction: *Harms v. Parsons*, 11 W. R. 250, 82 Beav. 328.

*Amphlett, Q. C.*, and *Rowcliffe*, for the defendant Slater, maintained that he was unable to prevent Sefton selling spirituous liquors and ales, and therefore was not a proper party to the suit. In *Clements v. Welles*, the bill against Welles, the intermediate party, was dismissed with costs: 14 W. R. 187, L. R. 1 Eq. 203.

*Druce, Q. C.*, and *Simmonds*, for the defendant Sefton, argued that the obvious intention of the covenant was to prevent the premises being used as a public house or tap-room, so as to be detrimental to the neighbourhood. The sale of liquors not to be consumed on the premises could not be within the scope of the covenant: *Pouse v. Coates*, 14 W. R. 1021, L. R. 2 Eq. 688. There was no evidence that the plaintiff had sustained any damage from the acts of Sefton, nor did the plaintiff in his bill allege any special damage, as he ought to have done: *Nokes v. Fish*, 8 Drewry, 735. As for the evidence adduced to affect Sefton with notice upon the facts of the case, it could not be admitted. An affidavit, filed on the part of one defendant, could not be used in evidence against a co-defendant. It would be a most oppressive case against a defendant if he had to take into consideration the affidavits adduced by his co-defendants. The covenant entered into by Slater did not run with the land either at law or in equity: *Keppell v. Bailey*, 2 My. & K 517; *Bristow v. Wood*, 1 Collyer, 480. In the case of *Tulk v. Moxhay*, a covenant was held not to bind an assignee without notice. In *Wilson v. Hart*, the under-lessee had notice of some restrictions; and in *Clements v. Welles*, the under-lessee had notice of the lease, and therefore was bound to inquire into its contents. In the present case,

the defendant Sefton had no notice of the deed by which his lessor claimed.

*Kay, Q. C.*, in reply, referred to statute 11 Geo. 4 and 1 Will. 4, c. 64, s. 81, and the judgment of Vice-Chancellor Wood, in *Pease v. Coates*, 14 W. R. 1021, L. R. 2 Eq. 691, which was a direct authority in favour of the present plaintiff. If all that was intended to be restrained by the covenant was the keeping of the house as a public-house, why were the words “or for the sale of spirituous liquors or ale or beer” added? With regard to the question of notice, he had himself, as counsel in *Wilson v. Hart*, strongly contended that a tenant from year to year could not have been bound to inquire into the title; but his contention was overruled. But in the present case there was not a tenancy from year to year, but a lease for twenty-one years.

With regard to Slater, he covenanted, not only that he would not do these things, but that he would not suffer or permit them to be done. He was owner in fee, and therefore was properly a party to the suit: *Hodson v. Coppard*, 9 W. R. 29 Beav. 4.

JAMES, V. C.—If it were a question whether the defendant Sefton had actual or constructive notice of the covenants in the indenture of the 25th April, 1854, except so far as he is fixed with constructive notice by not inquiring into his lessor's title, I should hold that he had not. The plaintiff could not have used against Sefton an affidavit filed on behalf of Slater. The case is different where, as in *Lord v. Colvin*, there is an open examination, and all parties are present; but I am not prepared to extend the doctrine in *Lord v. Colvin* to this case. It is not necessary, however, for the plaintiff to prove notice upon the facts of the case. I consider myself bound by the case of *Wilson v. Hart*. If a man will take a lease without inquiry into the lessor's title, he must be bound by the lessor's covenants. The question then further arises, what is the meaning of the covenants in this case? I have been much pressed to hold that they cannot apply to the sale of spirituous liquors in bottles. If I were to depart from the plain meaning of the words in this case, it would be impossible to say what particular mode of sale would or would not be permissible according to the covenant. But it is said that no damage has been proved to have been sustained by the plaintiff. But the plaintiff is not bound to prove that. He is the best judge why he wants specific performance of the covenant. The plaintiff is therefore entitled, as against Sefton, to an injunction against the use of the house for the sale of spirituous liquors.

As for Slater, there is no ground for making him a party to the suit. His position was known to the plaintiff at the time of filing the bill, and he seems to have done all he could to induce Sefton to refrain from what he was doing.

*Bill as against Slater dismissed with costs; injunction granted against Sefton, with costs.*

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PEATFIELD V. BARLOW—IN THE GOODS OF BAILEY.

[Eng. Rep.]

## PEATFIELD V. BARLOW.

*Order for payment of costs—Interest of London agents and country solicitors and suitors.*

A decree was made in the usual form ordering the payment of costs to F. & Co., the London agents of E. E.'s client had satisfied all claims of E. against him, and now prayed that the costs might be paid to him.

*Held*, that the order for payment to F. & Co. gave them no rights of lien or set-off in respect of the costs, or in any way altered the rights of the principals.

[V. C. M. 17 W. R. 516.]

This was a petition by Mr. and Mrs. Barlow, two of the defendants in the suit.

By a decree made in the suit on the 3rd of June, 1867, it was ordered that the costs of the petitioners should be taxed and paid to Messrs. Few & Co. Messrs. Few & Co. were the London agents of Mr. Esam, of East Retford, the solicitor for the petitioners.

At the date of the decree, Mr. Esam held in his hands a sum of £228 on Mr. Barlow's account, which exceeded all that was due to Mr. Esam for the costs of the suit. Mr. Esam subsequently became insolvent, and executed a deed under the Bankruptcy Act, 1861.

*Schomberg, Q. C.*, for the petitioners, asked that the costs of the suit due from the petitioners to Mr. Esam might be set off against the sum in Mr. Esam's hands, and that the costs to be paid out of the fund in court might be paid to the petitioners. He contended that the order directing payment to Messrs. Few & Co. was merely made in that form for convenience, and in no way affected the rights of those entitled to the money. He cited *Ward v. Hepple*, 16 Ves. 297; *Waller v. Holmes*, 9 W. R. 82, 1 J. & H. 239, and the cases there referred to.

*Pearson, Q. C.* and *Bardwell*, for Messrs. Few & Co.—Messrs. Few & Co. had a lien upon this fund for the amount of costs incurred by them as the agents of Mr. Esam. The payment of costs to the London agents is the usual and ordinary course, and the agents are justified in relying upon it in dealings with their principals. The decree directs payment to our clients, and is therefore binding, independently of any question between Mr. Esam and his client.

*MALINS, V. C.*—This is a case of great importance both to London agents and solicitors and suitors in the country. As to the money in Mr. Esam's hands, Mr. Barlow's right was at any time to direct him to apply it in payment of what was due to him in respect of his bill of costs, and the virtual bankruptcy of Mr. Esam cannot in any way derogate from that right. No doubt, the order in form directs payment to Messrs. Few & Co., but the payment was to be made to them only in their character of London agents of Mr. Esam, who was the petitioners' solicitor. But it was contended that this direction for the payment of costs to the London agents created a new right in them. I cannot accede to that argument. It is clear that if Mr. Barlow had paid Mr. Esam his costs, Messrs. Few & Co. could have no better right than Mr. Esam himself had. That rule was laid down by Lord Eldon in *Ward v. Hepple*, was adhered to by Lord Tenterden, and was followed by the present Lord Chancellor in *Waller v. Holmes*. I must, therefore, accede to the pe-

tion, and make the order asked for; but as it is enforcing an extreme right upon a novel point, there will be no order as to costs.

## PROBATE.

## IN THE GOODS OF BAILEY (DECEASED).

*Probate—Practice—Appointment of different executors in different wills—Codicil appointing sole executors—Implied revocation.*

The testator appointed A. and B. executors in a will disposing of part of his property, A. and C. in a second will, disposing of another part of his property, and sole executors in the codicil thereto.

*Held*, that the appointment of the executors in the first will was revoked, and probate was granted of the three testamentary papers to A. and C.

[17 W. R. 401.]

John Bailey died on the 31st July, 1868, leaving three testamentary papers, and by a will dated the 3rd January, 1866, bequeathed several specific legacies, and appointed his son, W. H. Bailey, and his daughter, Priscilla Bailey, executors.

By a codicil to the last mentioned will dated 24th of January, 1866, bequeathed several specific legacies out of other property—viz., certain South Sea Stock, and appointed his son and other daughter, Mary Jane Bailey, executors.

By a will of the 7th August, 1860, he bequeathed the residue, if any, of the South Sea Stock between his son and daughter, Mary Jane Bailey, and also appointed them his sole executors to this will.

*Searle* moved for a grant of probate of the will of the 3rd January, 1866, the codicil of the 24th January, 1866, and the will of the 7th August, 1860, to W. H. Bailey and his sisters, Priscilla Bailey and Mary Jane Bailey, the executors named in such wills. [Sir J. P. WILDE.—This is never done when the last codicil names certain persons to be sole executors and confirms the last will. It is a question of intention which depends on the language used in the documents.] In *Lowe's case*, 8 Sw. & Tr. 478, 38 L. J. Pr. & M. 155, a testator appointed A. and B. executors, and by a codicil appointed C. sole executrix of his will. *Held*, that the appointment of the executors of the will was revoked. In *Morgan's case*, L. R. 1 Pr. & D. 828, two testamentary papers were executed by a married woman. A. B. C. were, under different powers of appointment, appointed executors in the first will; C. was appointed sole executor in the last. Probate was granted to the three executors.

Sir J. P. WILDE.—Unless you can draw a distinction between this case and that of *In the goods of Lowe*, I shall follow the practice there laid down. For the words used in the last will clearly express an intention to revoke the appointment of the executors in the previous will. There is clearly a difference between the case of *In the goods of Lowe* and the case of *In the goods of Morgan*.

Granted probate of the will and codicil of 1866, and the will of 1860, as containing the last will of the testator to W. H. Bailey, and Mary Jane Bailey, the executors named in the last will dated August, 1860.

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BUTLER V. HORWITZ.

[U. S. Rep.]

## UNITED STATES REPORTS.

## UNITED STATES SUPREME COURT.

## BUTLER V. HORWITZ.

*(From The Pittsburgh Legal Journal.)*

In contracts for the payment of a certain sum in gold and silver coin made prior to the passage of the acts of Congress making United States notes legal tender, the damages for non-payment must be assessed in coin according to the contract, and judgment rendered accordingly.

The principles determined in *Bronson v. Rodas* (4 Legal Jour., N. S., p. 278), reasserted and held to govern this case.

The question of the constitutionality of the acts of Congress making United States notes legal tender not decided.

Error to the Court of Common Pleas for the State of Maryland.

Daniel Bowley, on the 18th of February, 1791, leased to Conrad Orendor a lot of ground on Water street, in the city of Baltimore, for 99 years, renewable forever, reserving rent in the following words, "yielding and paying therefor to the said Daniel Bowley, his heirs and assigns, the yearly rent or sum of £15, current money of Maryland, payable in English golden guineas weighing five pennyweights and six grains, at thirty-five shillings each, and other gold and silver at their present established weight and rate according to act of Assembly, on the 1st day of January in each and every year during the continuance of the present demise."

On the 1st of January, 1866, Mr. Horwitz was the owner of the rent and reversion, and Mr. Butler of the leasehold interest in the lot. Mr. Butler tendered the amount of the annual rent (\$40) then due, in currency, which Mr. Horwitz refused to receive, and brought suit to recover the value of the gold, in currency, on the 1st of January, 1866, which was \$58. Judge King, of the Court of Common Pleas, before whom the case was argued, gave judgment in favor of Mr. Horwitz for that amount, with interest. Mr. Butler then applied for a writ of error, taking the case to the Supreme Court of the United States, there being involved in the case the construction of an United States statute, which was decided adversely to the party claiming its benefit, as he had a right to do, under the act of Congress of 1789.

Chief Justice Chase, in delivering the opinion of the Supreme Court, substantially affirmed the opinion and judgment of the Court of Common Pleas, the only difference being in the practical method of carrying out the views entertained alike by both Courts—the Baltimore Court reduced the gold to currency, and the Supreme Court determining that the judgment should be entered for the amount claimed, with interest, in gold.

The case was argued in the Supreme Court by J. R. Quinn, Esq., for plaintiff in error, and by Benjamin F. Horwitz, Esq., for defendant in error.

CHASE, C. J.—The principles which determined the case of *Bronson v. Rodas* will govern our judgment in this case. The record shows a suit for breach of the covenant for payment of rent in a lease of certain premises in the city of Bal-

timore, made in 1791 for 99 years, renewable forever, upon an annual rent of £15, current money of Maryland, payable in English golden guineas, weighing five pennyweights sixteen grains, at 35 shillings each, and this gold and silver at their present weight and rate established by act of Assembly.

The obvious intent of the contract was to secure payment of a certain rent in gold and silver, and thereby avoid the fluctuations to which the currency of the country, in the days which preceded and followed the establishment of our independence, had been subject, and also all future fluctuations incident to arbitrary or uncertain measures of value, whether introduced by law or usage.

It was argued in the court below that the rent due upon the lease reduced to current gold and silver coin was, on the 1st of January, 1866, \$40, and judgment was rendered on the 27th of June, 1866, for \$59.17. This judgment was rendered as the legal result of two propositions:

1st. That the covenant in the lease required the delivery of a certain amount of gold and silver in payment of rent; and,

2d. That damages for non-performance must be assessed in the legal tender currency.

The first of these propositions is, in our judgment, correct; the second is, we think, erroneous.

It is not necessary to go at length into the grounds of this conclusion. We will only state briefly the general proposition on which it rests, most of which has been stated more fully in *Bronson v. Rodas*.

A contract to pay a certain sum in gold and silver is in substance and legal effect a contract to deliver a certain weight of gold and silver, of a certain fineness, to be ascertained by count. Damages for non-payment of such a contract may be recovered at law as for non-performance of a contract to deliver bullion, or any other commodity; but whether the contract be for delivery or payment of coin, or bullion or other property, damages for non-performance must be assessed in lawful money; that is to say, in money declared to be legal tender in payment, by a law made in pursuance of the Constitution of the United States.

It was not necessary in the case of *Bronson v. Rodas*, nor is it necessary now, to decide the question whether the acts making United States notes legal tender are warranted by the Constitution. We express no opinion on that point, but assume for the present the constitutionality of these acts. Proceeding upon this presumption, we find two descriptions of lawful money in use under the acts of Congress, in either of which damages for non-performance of contracts, whether made before or since the passage of the Currency acts, may be properly assessed in the absence of any different understanding or agreement between the parties; but the obvious intent in contracts for payment in coin to guard against fluctuations in the medium of payment warrants the inference that it was the understanding of the parties that such contracts should be satisfied, whether before or after the judgment, only by tender of coin; while the absence of any express stipulation as to description in contracts

## U. S. Rep.]

## BUTLER V. HORWITZ—REVIEWS.

for payment of money generally warrants the opposite inference of an understanding between parties that such contracts may be satisfied, before or after judgment, by the tender of any lawful money.

The inference as to contracts made prior to the passage of the acts making United States notes legal tender, is strengthened by the consideration that these acts not only do not prohibit, but by strong implication sanction contracts since their passage for the payment or delivery of coin, and consequently, taken in connection with the provision of the act of 1792, concerning money on account, require the damages upon such contracts to be assessed in coin, and judgment rendered accordingly, leaving the assessment of damages for breach of other contracts to be made and judgment rendered in lawful money.

It would be unreasonable to suppose that the Legislature intended a different rule as to contracts prior to the enactment of the Currency laws, from that sanctioned by them in respect to contracts since. We are of the opinion, therefore, that assessments of damages, whether in coin or in lawful money, severally, and judgments upon such assessments, should be in conformity to the stipulation of contracts in regard to the medium of payments. It follows that in the case before us the judgment was erroneously entered. The damages should be assessed at the sum agreed to be due, with interest, in gold and silver coin, and judgment for that amount with costs.

The judgment of the Court of Common Pleas must therefore be reversed, and the cause remanded for further proceedings.

MR. JUSTICE MILLER dissented, for reasons given by him in *Bronson v. Rodas*.

## REVIEWS.

AMERICAN LAW REVIEW. April, 1869. Little, Brown, & Co., Boston, U. S.

The April number of this valuable legal Magazine has been received. The principal articles are, Bluntschili's International Law; The Legal Qualifications of Representatives, and a discussion on the law of Copyright. There are also the usual Digests of Cases in the American Courts, Summary of Events Notice of Law Publications, &c. It notices that our namesake, the *Canada Law Journal*, in Lower Canada, has ceased to exist. Whilst we regret that it should have been found necessary to discontinue that publication, we cannot refrain from congratulating the *Review*, that the confusion caused by two publications in this country bearing the same name, is at an end.

BENCH AND BAR. Chicago: April, 1869.

This is the name of a new legal publication intended for the present to appear quarterly, and which will be mailed free of cost to such gentlemen of the profession as will forward their names to the publishers. It is thought that by this gratuitous distribution a larger class of readers will be reached than by affixing a subscription price. From our experience of journalism, we should think this will be found very likely. The class amongst the profession, at least in this country, that prefer a *gratuitous* distribution in this respect is very large, in fact their appreciation of the system is so great that they entirely ignore any silly promises to pay they may have made in a moment of weakness. We expect, therefore, that the *Bench and Bar* will have a very extensive circulation in Ontario. We shall be happy to supply its publishers with a list of several hundred lawyers that its terms would exactly suit, particularly if the postage is prepaid. We would suggest that the publishers should, in addition, give to each of such "subscribers" an annual bonus of three to five dollars a year, payable in advance: this would tend to ensure the ultimate success of the undertaking.

In the case of the very nicely got up publication before us, the intention is probably to make it a sort of advertising medium for the publishers. But however that may be it seems to be edited with much ability. By the bye, Chicago can now boast of two novelties in the way of legal journals, the one before alluded to, and another published by the wife of one of the judges. The liberality and gallantry of our brethren south and west of us will perhaps make the latter even a greater success than the former.

## CHICAGO LEGAL NEWS.

This comes to us in an enlarged form. The energy and spirit with which the editress conducts this paper is truly appalling. She has secured the success of her novel undertaking.

## PITTSBURGH LEGAL JOURNAL.

This is also increased in size under the auspices of a company, including amongst its members a number of the bar of the neighboring country.

## REVIEWS—APPOINTMENTS TO OFFICE.

OPINION OF UNITED STATES SUPREME COURT, by Chief Justice Chase, in the case of *The State of Texas v. White and others*. Washington: Jos. L. Pearson, 1869.

This is a leading case on the reorganization of State Governments after the late war, the effect of the alienation of State Property by insurgent governments, and notice to purchasers of such property.

## CÆSAR GRIFFIN'S CASE.

This is also an opinion of the same Chief Justice in another important case.

## APPOINTMENTS TO OFFICE.

## (CANADA GAZETTE.)

## PRESIDENT OF THE COUNCIL.

THE HON. JOSEPH HOWE, as President of the Privy Council of Canada, vice the HON. A. J. FERGUSON BLAIR, deceased. (Gazetted February 6, 1869.)

## COUNTY JUDGES.

GEORGE DUGGAN, of Osgoode Hall and of the City of Toronto, in the Province of Ontario, Esq., Barrister-at-Law, to be the Judge of the County Court of the County of York, in the said Province of Ontario. (Gazetted Feb. 20, 1869.)

## (ONTARIO GAZETTE.)

## BOARD OF COUNTY JUDGES.

JAMES ROBERT GOWAN, Judge of the County Court of the County of Simcoe; STEPHEN JAMES JONES, Judge of the County Court of the County of Brant; DAVID JOHN HUGHES, Judge of the County Court of the County of Elgin; JAMES DANIELL, Judge of the County Court of the United Counties of Prescott and Russell, and JAMES SMITH, Judge of the County Court of the County of Victoria, Esquires, to be the Board of County Judges, constituted under the Act, Statutes of Ontario, 32 Vic. cap. 23, and for the purposes therein mentioned. (Gazetted March 27, 1869.)

## CLERK OF EXECUTIVE COUNCIL.

JAMES ROSS, of the Town of Belleville, Esquire, to be Clerk of the Executive Council of the Province of Ontario, in the room and stead of JOHN SHUTER SMITH, Esq., resigned. (Gazetted March 13, 1869.)

## REGISTRARS.

JAMES WEBSTER, of the Town of Guelph, Esquire, Barrister-at-Law, to be Registrar of the County of Wallington, in the room and stead of JAMES WEBSTER, Esq., deceased. (Gazetted March 13, 1869.)

WILLIAM HENRY EYRE, of the Township of Hamilton, Esquire, to be Registrar for the west riding of the County of Northumberland, in the room and stead of the HON. GEORGE STRANGE BOULTON, deceased. (Gazetted March 13, 1869.)

## NOTARIES PUBLIC.

JACOB PAUL CLARK, of Brampton, gentleman. (Gazetted January 23, 1869.)

JAMES EDWARD ROBERTSON, of the City of Toronto, barrister-at-Law. (Gazetted February 20, 1869.)

ALBERT G. BROWN, of the Town of St. Catharines, Esquire, Barrister-at-Law. (Gazetted March 6, 1869.)

WILLIAM ALLAN McLEAN, of the City of Toronto, gentleman, Attorney-at-Law. (Gazetted March 13, 1869.)

ROBERT MCGEE, of the Village of Oshawa, gentleman, Attorney-at-Law. (Gazetted March 20, 1869.)

DANIEL BLACK CHISHOLM, of the City of Hamilton, Esquire, Barrister-at-Law. (Gazetted April 3, 1869.)

## CORONERS.

FRIEND RICHARD ECCLES, of the Village of Arkona, Esquire, M.D., to be an Associate Coroner in and for the County of Lambton. (Gazetted February 13, 1869.)

CHARLES R. STEWART, of Haliburton, Esquire, in and for the County of Peterboro'. (Gazetted February 20, 1869.)

JACQUES C. T. BEAUBIEN, of Ottawa, Esquire, M.D., in and for the City of Ottawa. (Gazetted Feb. 20, 1869.)

CHARLES ROBINSON, of the Township of Chingunacousy, Esq., M.D., in and for the County of Peel. (Gazetted March 20, 1869.)

WILLIAM RICHARDSON, of the Township of Nelson, Esq., M.D., in and for the County of Halton. (Gazetted April 3, 1869.)

THOMAS HOSSACK, of the Village of Lucan, Esquire, M.D., in and for the County of Middlesex. (Gazetted April 10, 1869.)

JOHN COVENTRY, of the Village of Wardsville, Esq., M.D., in and for the County of Elgin. (Gazetted April 10, 1869.)

JOHN BARE, of the Township of Melancthon, Esq., M.D., in and for the County of Grey. (Gazetted May 8, 1869.)

A gentleman appeared in a police-court a few days ago and asked the magistrate to put in force the new Master and Servants Act (30 & 31 Vict. c. 141) against his butler, who had absented himself without leave all Christmas Day, and on his return home next morning was very abusive. The magistrate informed the applicant that the Act in question does not apply to domestic servants, but suggested the dismissal of the offending butler without notice. The master said that if he adopted that course, he would have to pay the butler a month's wages in lieu of notice, which he objected to do; but the magistrate informed him that he was quite in error on that point. It is surprising how many people appear to be ignorant of the very simple rule of law that when a domestic servant disobeys any reasonable order, or is guilty of any misconduct, or neglects or refuses to work, he or she may be dismissed without notice, and that when so dismissed not only is there no claim to a month's wages in lieu of notice, but all wages actually due to the offending party are in strict law forfeited.—*Solicitors' Journal*.

Judge Story and Edward Everett were once the prominent personages at a public dinner in Boston. The former, as a voluntary toast, gave the following:—"Fame follows merit where Everett goes!" The gentleman thus delicately complimented at once arose, and replied with this equally felicitous impromptu: "To whatever height judicial learning may attain in this country, there will always be one Story higher."

## DEATH OF MR. JUSTICE JOHN WILSON.

## DIARY FOR JUNE.

1. Tue.. Paper Day, C. P.; New Trial Day, Q. B.
2. Wed. New Trial Day, Common Pleas.
4. Fri... New Trial Day, Queen's Bench.
6. SUN. 3rd Sunday after Trinity.
8. Tues. General Sessions and County Court Sittings in county (except York).
11. Fri... St. Barnabas.
13. SUN. 3rd Sunday after Trinity.
14. Wed. Last day for service for County Court of York.
20. SUN. 4th Sunday after Trinity. Accession of Queen Victoria, 1837.
26. Mon. Longest Day.
24. Thur. St. John Baptist.
26. Sat... Declare for County Court York.
27. SUN. 5th Sunday after Trinity.
29. Tue... St. Peter.
30. Wed. Half-yearly schedule returns to be made. Dep. Reg. in Chan. to make returns and pay over fees.

THE

## Canada Law Journal.

JUNE, 1869.

## DEATH OF MR. JUSTICE JOHN WILSON.

The hopes we expressed last month for the recovery of Mr. Wilson were not destined to be fulfilled. After a temporary rally he sank rapidly, and expired on the morning of Thursday the 3rd June instant. The news, though not unexpected, cast a gloom over Osgoode Hall, where the news was received about one o'clock, whilst both the courts were sitting. Both Courts rose immediately, the Court of Common Pleas—his Court—adjourned until Saturday following, and the Court of Queen's Bench adjourned until the next day, the state of the public business preventing any further postponement of the numerous cases before it.

A short sketch of Mr. Wilson's career will be interesting to our readers.

Very full particulars are given in some of the papers in the Western District, of his early life, and the labours which eventually brought him to Toronto as one of the Judges of the Court of Common Pleas.

He was born at Paisley, in Scotland, in March, 1809, which would make him more than sixty years old at the time of his death, though he scarcely looked it, at least until lately. His father was a weaver by trade; and from him the subject of this sketch is said to have inherited the shrewd, vigorous mind characteristic of the man. He came to Canada in 1819 with his father, who settled near Perth.

His early life subsequent to this, until he became eminent in his profession is thus described in a London paper, from which we make the following extract:—

"Very early he engaged in farming, but not being strong enough for the work, had to give it up. From tilling the ground, he went, still very young, to school teaching, in which employment, while benefiting others, his own faculties were informed and cultivated. By and by he became anxious for a higher order of education, with a view to a profession, if fortune would second his laudably ambitious aims. He entered himself straightway as a pupil in the Perth Grammar School, then under the management of Mr. John Stewart, now a barrister in Stratford. Showing much aptness for learning and very marked capacity, the lad was recommended to study law, and he wisely accepted the advice. His next step was to enter the office of Mr. James Boulton, now a barrister in Toronto, but then practising in Perth. As an evidence of the confidence Mr. Boulton had in his apprentice, he at length entrusted him with the entire management of a branch office which was opened at Bytown, now known as Ottawa, the capital of the country. After some three years Mr. Boulton removed to Niagara, whither his clerk was invited to accompany his master, and there he completed his studies. In 1834, (in Easter Term, having been admitted as an Attorney on 5th November, 1834), Mr. Wilson was called to the Bar, and immediately proceeded to London to enter on an independent professional career. At that date London was a village containing 500 or 600 inhabitants, with only three lawyers—Mr Tenbroeck, and Stuart Jones, barrister, both of them dead years ago, and Mr. John Stewart, barrister, now clerk in the office of the Minister of Justice, at the seat of Government. In a very short time he acquired a largo legal practice in what was then the London District, embracing within its extensive bounds what are now the counties of Elgin, Middlesex, Oxford, Huron, Grey, Bruce, Norfolk, Perth, and a portion of Brant. His old Grammar School master, Mr. Stewart, it is worth mentioning, ere long entered his office as a clerk, and completed his studies under his former pupil's supervision. And here it may be stated, quite as well as in any other connection, that the many students that passed through his office, from first to last, have a lively and pleasant



## DEATH OF MR. JUSTICE JOHN WILSON—APPOINTMENT OF MR. GALT—NEW LAW BOOKS.

recollection of the interest he took in them and their progress. He who was willing to learn had in Mr. Wilson a competent guide and a warm hearted friend. Indeed, Mr. Wilson was prone to help and encourage young men, and his junior brethren were often indebted to him for valuable aid. Many a young man, not in the ranks of his profession, he assisted in a substantial manner, though he shunned all publicity in these and a thousand other generous deeds."

In politics he was a Reformer, and received his appointment as judge from that party. He was twice elected to the Assembly for the city of London, and once for the St. Clair division in the Legislative Council.

In 1856 he was made a Queen's Counsel at the same time as his townsman Mr. Becher. In the vacation after Easter Term, he was appointed to the judgeship rendered vacant by the changes consequent on the retirement of Chief Justice McLean from the Queen's Bench, Mr. Wilson taking the seat occupied in the preceding term by Mr. Morrison.

A powerful advocate everywhere, before the juries in that part of Canada where he was best known, he was without an equal. His success in this respect was largely increased by his personal popularity. He had a generous, honest, manly heart, ever ready to assist the needy, and at the same time the champion of those he considered oppressed. Above all things he loved fair play, and anything in the shape of meanness, oppression or rascality, he abhorred; few who knew him will not have noticed, whether in private life, at the Bar, or on the Bench, these prominent features of his character.

The most successful advocates do not necessarily make the best judges. The cast of mind so essential in the one has a tendency to prevent eminence in the other. This is so obvious and has been so often exemplified that it has become common to prophesy that a good jury lawyer will be a failure when placed on the Bench. In some of the attributes common to both Mr. Wilson excelled, though it cannot be said that in the latter position he was as great a success as in the former. Though not as a lawyer as deeply read, or as careful of, or well versed in case law as some of his brethren on the bench he had, to a remarkable extent, a shrewd strong common sense and intuitive perception of right and wrong, which seemed to steer him

clear of the rocks that would have shipwrecked the reputation of even a more learned man, not possessed of the attributes we have attempted to describe. As might be expected, these characteristics combined with a ready wit, much decision of character, an intimate knowledge of human nature, and a clear insight into the motives of action, made him particularly useful as a *Nisi Prius* judge. As a Chamber judge on the other hand, though no complaints were ever heard that his decisions were not an equitable adjustment of the rights of parties, it has been said by some that occasionally difficulties arose from want of a more strict adherence to those rules of practice which, after all, are so necessary to keep the machinery of justice in harmonious working order.

In the West, where Mr. Wilson was best known, he was most liked, and as his popularity was based on respect for his good qualities, it was lasting, and followed him from the neighbourhood where he had lived so long to the more extended sphere of his labours on the Bench.

## THE APPOINTMENT OF MR. GALT.

The vacancy caused by the death of Mr. Justice John Wilson, has been filled by the appointment of Mr. Thomas Galt, Q. C.

We congratulate the learned counsel upon his promotion to a position which has always been, so far as the position itself is concerned, (and long may it so continue), an object of laudable ambition to the bar of Ontario. A sound lawyer, a man of unswerving integrity and stainless honor, with every instinct that of a gentleman, his appointment will be acceptable to the profession, nor will the public have reason to regret it.

## NEW LAW BOOKS.

There are two Law Books just announced by Canadian authors which the profession will be glad to see.

The first is the new and long wanted edition of Harrison's Common Law Procedure Act. The first part of this invaluable book of practice has been published and is now ready for delivery. The remaining parts will be got out as speedily as possible, consistent with a thorough verification of the authorities cited.

It will be a complete compendium of practice, including as well the Common Law Procedure

## NEW LAW BOOKS—GRAND JURY—SUPREME COURT ACT.

Act as all the other acts relating procedure, and will contain much more information than the first edition, and the learned editor has taken great pains to work in all the latest cases in their appropriate places.

The second, no less important though treating on an entirely different subject, is Mr. Leith's edition of the Real Property Statutes of Ontario.

We are perfectly willing to take for granted, and others will follow our example, that whatever Mr. Leith writes on the law of Real Property will be well written, both as to the matter and the manner of it. We have not as yet had an opportunity of examining this his last work, but we may now mention that our readers have already had the benefit of at least a small portion of it, through the courtesy of the author, in an article on "Memorials as Secondary Evidence," published in our January number for last year.

We strongly advise our readers immediately to supply themselves with both of these books and *not* put them away merely to fill a place in their shelves.

Mr. O'Brien has published an unpretending edition of the late Division Courts Act, with notes, which the profession may find useful, as it collects all the cases in our Courts as to attachment of debts.

The following is extracted from the presentment of the Grand Jury at the recent assizes for the County of Norfolk.

The Chief Justice of Ontario presided.—

"The Grand Jurors for our Lady the Queen most respectfully present, that they have carefully considered and disposed of the various criminal matters laid before them by the learned officer for the Crown, and that in the discharge of these important duties they were materially aided by the very lucid and admirable exposition of the Criminal Law, (as applicable to the various cases on the calendar), contained in the remarks addressed to us by His Lordship the Chief Justice at the opening of this Court; and while, as members of this grand inquest, we congratulate ourselves, and the people of this province generally, in having the position vacated by that eminent jurist, the Honorable W. H. Draper, filled by one possessing in so large a degree the confidence, not only of the Bar, but also of the public, as your Lordship does, we would, at the same time, congratulate your Lordship upon your elevation to the high and honorable position of Chief Justice of Ontario—a position which, we earnestly hope, you will long continue to occupy and adorn.

Your Grand Jurors cannot avoid making some reference to a class of cases which occupies much

of the time of both Grand and Petit Jurors, and adds largely to the expenses connected with the administration of criminal justice. We allude to petty larcenies, and we venture to express the hope that some legislation by which these cases may disposed of in some more summary and less expensive manner may, ere long, be initiated.

The following is the Bill that has just been introduced by the Minister of Justice to establish a Court of Appeal or Supreme Court for the whole Dominion. As it is a matter of great importance, we publish it in full (except a few formal provisions). It is not the intention to press it through this session.

Her Majesty, &c., enacts as follows:—

1. There is hereby constituted and established a Court of Common Law and Equity and Admiralty Jurisdiction in the Dominion of Canada, which shall be called "The Supreme Court of Canada."

2. The said Court shall be a Court of Record.

THE JUDGES.

3. The said Court shall be presided over by a Chief Justice and six Puisne Judges, any four of whom in the absence of the others of them may lawfully hold the said Court in General Term.

4. Her Majesty may appoint by Letters Patent under the Great Seal of Canada, one person who is or has been a judge of one of the Superior Courts in either of the Provinces of Ontario, Quebec, Nova Scotia or New Brunswick, or who is a Barrister or Advocate of at least fifteen years' standing at the Bar of either of the said Provinces, to be Chief Justice of the said Court, and six persons who are or have been Judges of one of the said Superior Courts or who are Barristers or Advocates of at least ten years' standing, to be Puisne Judges of the said Court; and vacancies in any of the said Offices shall from time to time be filled in like manner.

5. The Chief Justice of the said Court shall have rank and precedence over all other Judges in the said Dominion, or in any of the Provinces thereof; and the Puisne Judges of the said Court shall also take precedence over all other Judges in the Dominion, or any of the said Provinces (except Chief Justices and the Chancellor of Upper Canada), and as between themselves according to seniority of appointment to their respective offices.

6. The Judges to be appointed under this Act shall hold their Offices during good behaviour, but the Governor General may remove any Judge or Judges of the said Court, upon the address of the Senate and House of Commons.

## SUPREME COURT ACT.

7. [Salaries (amounts blank) and how payable.]

8. [Retiring allowances of Judges of the Court to be two-thirds of salary payable to such Judge;] but no annuity granted to any Judge appointed under this Act, shall be valid unless such person shall have continued in the said office for the space of fifteen years, or for that space in the said office and the office of a Judge of one or more of Her Majesty's Superior Courts of Law or Equity in one of the said Provinces, or shall be afflicted with some permanent infirmity, disabling him from the due execution of his office, which shall be recited in the grant.

9, 10. [Oath of Office.]

11. No Judge to be appointed under this Act, shall hold any other Office either under the Government of the Dominion of Canada, or under the Government of either of the said Provinces.

## APPELLATE JURISDICTION.

12. The said Supreme Court shall have, hold, and exercise an appellate civil and criminal jurisdiction within and throughout the Dominion of Canada.

13. Appeal shall lie to the said Supreme Court from all judgments of the Courts of Error and Appeal, Queen's Bench, Chancery and Common Pleas, in the Province of Ontario; of the Court of Queen's Bench and Superior Court in the Province of Quebec; of the Executive Councils and Supreme Courts in the Provinces of Nova Scotia and New Brunswick.

14. Appeals shall also lie to the said Supreme Court from the Special Terms of the said Court hereinafter provided for.

15. A Writ of Error may be brought in the said Supreme Court from the judgment in any civil action or criminal proceeding of any of the said Provincial Courts, or of any special term of the said Supreme Court, in any case in which the proceedings shall have been according to the course of the common law of England.

16. Four Judges of the said Supreme Court shall constitute a quorum for the purpose of hearing and determining causes in Appeal and Error.

17. The said Supreme Court for the purpose of hearing and determining Appeals and Writs of Error, and of exercising such original jurisdiction as is hereinafter directed to be exercised by the said Court sitting in general term, shall hold two terms in each year, at the City of Ottawa, one of such terms beginning on the third Monday in January, and the other of such terms beginning on the first Monday in June, in each year, and each of such terms shall continue for the space of twenty days.

18. The said terms shall be called and known as the General Terms of the said Supreme Court.

19. The said Supreme Court may adjourn the said General Terms from time to time, and meet again at the time fixed on the adjournment for the transaction of business.

20. The said Supreme Court shall have power to quash proceedings in cases brought before it, in which Error or Appeal does not lie, or where such proceedings are taken against good faith, or in which proceedings in Error may be quashed according to the law and practice of the Court of Exchequer Chamber in England.

21. The said Supreme Court shall have power to dismiss an Appeal, or to give the judgment or decree, and to award the process or other proceedings, which the Court whose decision is appealed against ought to have given or awarded; and the said Court may order the payment of the costs of the Court below, and also of the Appeal or proceeding in Error in their discretion, and as well when the judgment or decree appealed from is reversed as where it is affirmed.

22. Proceedings on Writs of Error shall, where not otherwise provided for by this Act, or by the general rules and orders to be made in pursuance hereof, be as nearly as possible in conformity to the practice of the Court of Exchequer Chamber in England.

23. Proceedings in Appeals from decrees, judgments or orders in Equity and Admiralty, and from the Courts of the Province of Quebec in civil causes, shall when not otherwise provided for by this Act, or by the general rules and orders to be made in pursuance hereof, be as nearly as possible in conformity with the present practice of the Judicial Committee of Her Majesty's Privy Council.

24. The judgment, decree or order of the said Supreme Court in Appeal shall be certified by the Registrar of the said Court, to the proper officer of the Court having original jurisdiction below, and all subsequent proceedings may be taken thereupon as if the judgment, decree or order had been given or pronounced in the said Court below.

25. An Appellant or Plaintiff in Error may discontinue his proceedings by giving to the Respondent a notice entitled in the Court and cause and signed by the Appellant, his Attorney or Solicitor, stating that he discontinues such proceedings, and thereupon the Respondent or Defendant in Error shall be at once entitled to the costs of and occasioned by the proceedings in Appeal or Error, and may either sign judgment for such costs, or obtain an order for their payment in the Court of original jurisdiction below, and may take all further proceedings in that Court as if no appeal or proceedings in error had been brought.

## SUPREME COURT ACT.

26. A respondent or defendant in Error may consent to the reversal of the judgment, decree or order appealed against, by giving to the appellant or plaintiff in Error, a notice entitled in the Court and cause, and signed by the respondent or defendant in Error, his attorney or solicitor, stating that he consents to the reversal of the judgment, decree or order, and thereupon the Court shall pronounce judgment of reversal, as of course.

27. In case an appellant or plaintiff in Error shall fail to bring the appeal or proceeding in Error on to be heard at the first general term of the said Supreme Court, after the appeal or proceeding in Error shall be ripe for hearing, the respondent or defendant in Error may, on notice to the appellant or plaintiff in Error, move the said Supreme Court, or a Judge thereof in Chambers, for the dismissal of the appeal, or that the writ of Error be quashed, and such order shall thereupon be made as to the said Court or Judge shall seem just.

28. No appeal or writ of Error shall be allowed from any final judgment, decree or decretal order, unless the same be brought within two years from the signing or pronouncing thereof, and no appeal shall lie from any interlocutory order or rule, unless the same be brought within six months from the making or granting thereof.

29. No appeal shall be allowed or writ of Error issued, until the appellant or plaintiff in Error has given proper security to the extent of five hundred dollars to the satisfaction of the Court below, from whose judgment, order or decree he is about to bring Error or appeal or a Judge thereof.

30. Upon the perfecting of such security execution shall be stayed in the original cause, except in the following cases:—

1st. If the decree, order or judgment which is appealed from, or upon which Error is brought, directs an assignment or delivery of documents or personal property, the execution of the decree or judgment shall not be stayed until the things directed to be assigned or delivered have been brought into Court, or placed in the custody of such officer or receiver as the Court appoints, nor until security has been given to the satisfaction of the Court whose judgment, decree or order is appealed from, or from which Error is brought, or of a Judge thereof, in such sum as the said Court or Judge may direct, that the appellant will obey the order or judgment of the said Supreme Court.

2nd. If the decree, order or judgment appealed from, or upon which Error is brought, directs the execution of a conveyance or any other instru-

ment, the execution of the decree, order or judgment shall not be stayed until the instrument has been executed and deposited with the proper officer of the said Court below, to abide the order or judgment of the said Supreme Court.

3rd. If the decree, order or judgment appealed from directs the sale or delivery of possession of real property, chattels, real or immovable, the execution of the decree, order or judgment shall not be stayed until security has been entered into to the satisfaction of the said Court below, or a Judge thereof, and in such sum as the said last mentioned Court or Judge directs, that during the possession of the property by the appellant or plaintiff in Error, he will not commit or suffer to be committed any waste on the property, and that if the decree, order or judgment be affirmed he will pay the value of the use and occupation of the property from the time the appeal or writ of Error is brought until the delivery of possession thereof; and also in case the order, judgment or decree is for the sale of property and the payment of a deficiency arising upon the sale, that the appellant or plaintiff in error will pay the deficiency.

4th. If the decree, order or judgment appealed from, or upon which a writ of Error is brought, directs the payment of money, either as a debt, or for damages or costs, execution thereon shall not be stayed until the appellant or plaintiff in Error has given security to the satisfaction of the Court below, or of a Judge thereof, that if the decree, order or judgment or any part thereof, be affirmed, the appellant or plaintiff in Error will pay the amount thereby directed to be paid, or the part thereof as to which the judgment may be affirmed, if it be affirmed only as to part.

5th. If the decree, order or judgment appealed from, or upon which Error is brought, directs the delivery of perishable property the said Court below, or a Judge thereof, may order the property to be sold and the proceeds to be paid into Court, to abide the order or judgment on appeal.

31. When the security has been perfected and allowed, any Judge of the Court appealed from, or upon the judgment of which Error is brought, may issue his fiat to the Sheriff to whom any execution on the decree, order or judgment has issued to stay the execution, and the execution shall be thereby stayed, whether a levy has been made under it or not.

32. If at the time of the receipt by the Sheriff of the fiat, or of a copy thereof, the money has been made or received by him, but not paid over to the party who issued the execution, the party appealing may demand back from the Sheriff the amount made or received under the execution, or

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so much thereof as is in his hands not paid over, and in default of payment by the Sheriff, upon such demand, the appellant or plaintiff in Error may recover the same from him in action for money had and received, or by means of an order or rule of the Court appealed from.

33. An appeal, but not a writ of error, shall lie from a judgment of a Court of common law, and from a judgment of the common law side of the said Supreme Court sitting in special term as hereinafter provided for, upon a special case, unless the parties agree to the contrary; and the proceedings for bringing a special case before the said Supreme Court shall as nearly as possible be the same as in the case of a special verdict, and the said Court shall draw any inferences of fact from the facts stated in the special case which the Court of original jurisdiction ought to have drawn.

34. An appeal shall lie from the decision of any Court of common law, and from the common law side of the said Supreme Court sitting in special term, in the case of a rule to enter a verdict or nonsuit upon a point reserved at the trial, whether a rule to shew cause has been refused or granted, or has been discharged or made absolute.

35. In all cases of motion for a new trial upon the ground that the Judge has not ruled according to law, if the rule to shew cause be refused, or if granted be afterwards discharged or made absolute, the party decided against may appear provided any one of the Judges dissent from the rule being refused, or when granted, from its being discharged or made absolute, as the case may be, or provided the Court in its discretion think fit that an appeal should be allowed.

36. No appeal shall be allowed under the three next preceding sections, unless notice thereof be given in writing to the opposite party, or his attorney of record, within twenty days after the decision complained of, or within such further time as the Court appealed from or Judge thereof may allow.

37. When the application for a new trial is upon matter of discretion only, as on the ground that the verdict is against the weight of evidence or otherwise, no appeal shall be allowed.

38. The four next preceding sections shall apply to informations *in rem.* and to informations for penalties for the infraction of any Revenue Law.

39. Any appeal shall lie in ejectment in the same manner and to the same extent as in any other case.

40. An appeal shall, in addition to proceedings in Error, where the same are applicable, lie to the said Supreme Court in all cases of proceedings

for or upon a Writ of Mandamus, and [to] all proceedings upon Habeas Corpus, and in all cases upon which a by-law of Municipal Corporation has been quashed by rule of Court after argument.

41. A person convicted of treason, felony or misdemeanor before the Court of Queen's Bench or Common Pleas, in the Province of Ontario, or before the Court of Queen's Bench in the Province of Quebec, or before the Supreme Court in either of the said Provinces of Nova Scotia or New Brunswick, or who has been convicted as aforesaid before any Court of Oyer and Terminer or Gaol Delivery, and whose conviction has been affirmed by any of the hereinbefore mentioned Provincial Courts, may appeal against the conviction or affirmation, and the Supreme Court shall make such rule or order therein either in affirmance of the conviction or for granting a new trial, or otherwise, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect; but no such appeal shall be made unless allowed by the Superior Court appealed from, or by two of the Judges thereof in term or vacation, nor unless such allowance has been granted and the appeal has been heard within six months after the conviction was affirmed, unless otherwise ordered by the said Supreme Court, and any rule or order of the said Supreme Court shall be final.

42. No other appeal from a decision of any Court of common law shall be allowed; but in any case, either civil or criminal, in which the judgment, decision or other matter appealed against shall appear of record, a Writ of Error shall notwithstanding lie.

43. A Writ of Error shall lie where the matters complained of appear of record, from all judgments of the Court of Queen's Bench in the Province of Quebec in criminal cases; but in all other cases in which any judgment or order of the said Court of Queen's Bench, or of the Superior Court of the said Province of Quebec, is sought to be reversed in the said Supreme Court, the proceedings shall be by way of appeal only, and no Writ of Error shall lie.

44. In the case of the death of one of several appellants pending the appeal to the said Supreme Court, a suggestion may be filed of his death, and the proceedings may thereupon be continued at the suit of and against the surviving appellant, as if he were the sole appellant, and such suggestion, if untrue, may be set aside on motion made to the said Supreme Court, or a Judge thereof in Chambers.

45. In case of the death of a sole appellant, or of all the appellants, the legal representative of the sole appellant, or of the last surviving appel-

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lant, may, by leave of the Court, or a Judge, file a suggestion of the death, and that he is such legal representative, and the proceedings may thereupon be continued at the suit of, and against such legal representative as the appellant, and if no such suggestion be made, the respondent may proceed to an affirmance of the judgment, according to the practice of the Court, or take such other proceedings as he may be entitled to, and such suggestion, if untrue, may be set aside on motion by the said Court, or a Judge thereof.

46. In case of the death of one of several respondents, a suggestion may be filed of such death, and the proceedings may be continued against the surviving respondent, and such suggestion, if untrue, may be set aside on motion by the said Court, or a Judge thereof.

47. In the case of the death of a sole respondent, or of all the respondents, the appellant may proceed upon giving one month's notice of the appeal, and of his intention to continue the same, to the representative of the deceased party, or if no such notice can be given, then upon giving the notice to the parties interested, as a Judge of the said Supreme Court may direct.

48. The foregoing provisions respecting appeals shall apply as well to cases where the appeal shall be from any Court of Appeal in any of the said Provinces, as to cases where the appeal shall be brought directly from the Court of original jurisdiction.

49. In appeals in cases on the Admiralty side of the said Supreme Court no new allegations or evidence shall be admitted.

## SPECIAL CASE ON CONSTITUTIONAL MATTERS.

50. The Governor General, by and with the advice and consent of the Privy Council may direct a special case to be laid before the Supreme Court sitting in general term, in which special case there may be set forth any Act passed by the Legislature of any Province of the Dominion of Canada, and thereupon there may be stated for the opinion of the said Supreme Court such questions as to the constitutionality of the said Act, or of any provision or provisions thereof, as the Governor General in Council may order.

51. The said Supreme Court shall, after hearing counsel for the Dominion of Canada, and for the Province whose Act shall be in question (if the respective Governments of the Dominion and the Province shall think fit to appear), and also after hearing counsel for such person or persons whose interests may be affected by the said Act, who may desire to be heard touching the questions submitted for the opinion of the said Court, and who shall have obtained leave to appear and be so heard on application to a Judge of the said

Court in Chambers, certify their opinions upon the said special case to the Governor General in Council.

## ORIGINAL JURISDICTION.

52. Except as hereinafter provided, the said Supreme Court shall exercise no original jurisdiction whilst sitting in General Term.

53. The said Supreme Court shall have and possess exclusive original jurisdiction in the Dominion of Canada in all causes at law and equity in the Provinces of Ontario, Nova Scotia and New Brunswick, and in civil causes in the Province of Quebec as follows:

1st. In all cases in which the constitutionality of any Act of the Legislature of any Province of the Dominion shall come in question.

2nd. In all cases in which it shall be sought to enforce any law of the Dominion of Canada relating to the revenue, or in which any such law shall come in question, including actions, suits, and proceedings, by way of information, to enforce penalties and proceedings by way of information *in rem*.

3rd. In all cases in which the Crown, as representing the Government of Great Britain and Ireland, or the Government of any British colony, or the Government of any Province of the Dominion, shall be a party, plaintiff or defendant.

4th. This shall not be deemed to take away summary jurisdiction in revenue matters in any case in which the same may now be exercised by Justices of the Peace.

5th. In all cases in which any foreign State or Government shall be a party plaintiff.

6th. In all cases in which any Consul of a foreign State shall be a party.

7th. In all cases in which any law of the Dominion of Canada passed to carry out a treaty with a foreign Government shall come in question.

8th. In all cases in which any question shall arise under any Statute or Act of the Parliament of Canada hereafter to be passed, and by which exclusive original jurisdiction shall be conferred on the said Supreme Court.

54. In case in any action or suit brought or instituted in any Court of any of the said Provinces, it shall be found impossible to proceed for want of jurisdiction, in consequence of a question arising therein as to the constitutionality of any Act of the Legislature of any of the said Provinces, the said cause may be removed by Certiorari into the said Supreme Court, in which case proceedings therein shall be thereafter carried on as though such action or suit had been originally brought or instituted in the said last mentioned Court.

55. The Judges of the said Supreme Court shall make general rules and orders regulating

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the proceedings to remove such causes, and the proceedings therein after removal.

56. The said Supreme Court shall have, in the several Provinces of Ontario, Nova Scotia and New Brunswick, in causes at law and in equity, and in the Province of Quebec in civil causes concurrent and original jurisdiction with the Provincial Courts in the following cases:

1st. Where the plaintiff and defendant, or one of several plaintiffs and one of several defendants are domiciled in different Provinces of the Dominion.

2nd. Where either the plaintiff or defendant, or one or more of several plaintiffs, or one or more of several defendants, are domiciled without the Dominion.

57. The said Supreme Court and the Judges thereof shall also have exclusive original jurisdiction to issue the Writ of Habeas Corpus *ad subjiciendum* to bring up the body of any person in custody within the Dominion of Canada, in pursuance of any treaty with any foreign State or Government for the extradition of criminals, or in pursuance of any Act of the Parliament of Great Britain and Ireland, or of the late Province of Canada, or of the said Dominion, to carry out the provisions of any such treaty.

58. The said Supreme Court shall also have and possess exclusive jurisdiction in Admiralty in cases of contract and tort, and in proceedings *in rem*, and *personam*, arising on or in respect of the navigation of, and commerce upon the inland navigable waters of the Dominion, above tide water, and beyond the jurisdiction of any now existing Court of Vice-Admiralty.

59. For the purpose of exercising the original jurisdiction of the said Supreme Court, a special term of the said Court shall be held on the first Monday of April and October in each year, at the cities of Toronto, Quebec and Halifax, for the respective Provinces of Ontario, Quebec and Nova Scotia, and on the third Monday of April and October in each year at the city of Fredericton, for the Province of New Brunswick, and the said special term shall continue until the Saturday of the following week.

60. Two Judges of the said Court shall constitute a quorum at such special terms.

61. At the said special terms there shall be transacted the following business:

1st. Such proceedings in suits at common law as may be had before the Courts of common law at Westminster sitting in Banc.

2nd. The re-hearing of causes, petitions and motions in equity causes which may have already been heard before a single Judge.

3rd. The review of proceedings in Admiralty

causes which shall have previously been heard before a single Judge.

4th. In the Province of Quebec the review or the re-hearing of causes, petitions and motions which have already been heard and determined by a single Judge, and for the hearing and disposing of applications for new trials, and the disposal of such other matters as according to the code of procedure of the Province of Quebec may be disposed of by the Superior Court of the said Province sitting in Banc.

62. On the first Monday in March and September in each year a single Judge of the said Supreme Court shall hold a sittings at the said cities of Toronto, Quebec, Halifax and Fredericton, for the respective Provinces of which the said cities are the capitals, and at such sittings the following business may be transacted:

1st. The trial of all issues of facts in actions on the common law side of the said Court.

2nd. The disposition of matters of practice not cognizable by a Judge sitting in Chambers in actions at common law.

3rd. The hearing of causes in suits on the equity side of the said Court.

4th. The hearing of causes on the Admiralty side of the said Court.

5th. In the Province of Quebec the hearing and trial of causes and the transaction of all business which according to the provisions of the said code of procedure may be within the jurisdiction of a single Judge of the Superior Court, sitting in open Court.

63. A single Judge of the said Court may sit in Court out of Term, and may hear and determine causes and all interlocutory matters in Admiralty causes, and may hear and determine motions, petitions and all other interlocutory applications in equity suits.

64. All actions, suits and proceedings in the said Supreme Court, shall be carried to a termination in the Division of the Court for the Province in which the said actions, suits and proceedings shall be originally brought.

65. The rule of decision in all civil actions (excepting causes in Admiralty) which may be brought in the Province of Quebec, shall be the law of the said Province, and the proceedings in such suits shall be regulated by the Code of Procedure of the said Province.

66. The rule of decision in all actions at law, and suits in equity brought or instituted in the said Court, in any of the Provinces of Ontario, Nova Scotia and New Brunswick, shall be the law of England.

67. The procedure in actions at common law including suits relating to the Revenue, shall un-

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less otherwise herein provided for or afterwards provided for by general rules made in pursuance of this Act, be regulated by the practice and procedure of Her Majesty's Courts of Common Law at Westminster.

68. Issues of fact on the common law side of the said Court shall be tried according to the rules of the common law of England by a jury.

69. The procedure in suits in equity shall unless otherwise herein provided for or afterwards provided for by general orders made in pursuance of this Act, be regulated by the practice of Her Majesty's High Court of Chancery in England.

70. The procedure in Admiralty causes shall unless otherwise herein provided for by general orders made in pursuance of this Act, be regulated by the present practice of the High Court of Admiralty of England, on its instance side.

71. In actions at common law and suits in equity, brought in the said Court by the Crown, as representing the Government of the United Kingdom, or the Government of one of the Provinces, or of a British Colony, the proceeding shall be by information in the name of Her Majesty's Attorney General for the Dominion.

72. In actions and suits brought against the Crown as representing any of the Governments in the last preceding section mentioned, the procedure may be as nearly as possible according to the Act of the Imperial Parliament, known as the "Petition of Rights Act."

73. The said Supreme Court sitting in special term, may on a proper case and subject to the provisions as to jurisdiction hereinbefore contained, grant the prerogative Writ of Mandamus.

74. The process of the said Court shall run throughout the Dominion of Canada, shall be tested in the name of the Chief Justice of the said Court, and shall be directed to the sheriff of any County, or other judicial division into which any of the said Provinces may be divided, and the Sheriffs of the said respective Counties or divisions shall be deemed and taken to be ex-officio Officers of the said Supreme Court, and shall perform the duties and functions of Sheriffs in connection with the said Court and shall also perform the duties of the Marshall in Admiralty causes and matters.

75. The said Sheriffs shall receive and take to their own use, such fees as the Judges of the said Supreme Court shall by general order fix and determine.

76. The Sheriff of the respective Counties or district in which the said sittings of the said Supreme Court are to be held on the first Mondays of March and September, as hereinbefore provi-

ded for, shall in the same manner as jurors are struck and summoned according to the laws of the particular Province in which the sittings shall be held, for service on juries of the Superior Courts of the Province, strike a panel of thirty-six jurors and cause such jurors to be duly summoned to attend the said sittings for the trial of issues of fact, and the said Sheriff shall return the said panel into Court on the first day of the said sittings.

77. There shall be a Registrar of the said Court who shall reside and keep his Office at the City of Ottawa.

78. There shall be four Deputy Registrars of the said Court, one of whom shall reside and keep his Office at each of the said Cities of Toronto, Quebec, Halifax and Fredericton.

79. The proceedings in actions, suits or causes originally brought in the said Supreme Court or removed thereto as hereinbefore provided, shall be carried on in the offices of the said Deputy Registrars respectively.

80. The said Registrar shall be paid a salary of        dollars per annum, and the said Deputy Registrars shall each be paid a salary of        dollars per annum, and the said Registrar and Deputy Registrars shall be appointed by an instrument under the great seal of the Dominion of Canada to hold office during pleasure.

81. [Fees to be paid by stamps.]

82. The Judges of the said Court may appoint such persons as they may think fit, being Barristers-at-law of not less than three years standing, to be masters, referees and examiners in suits in equity depending in the said Court, to whom reference may be ordered, and who may take evidence in causes in equity depending therein.

83. The said masters shall receive and take to their own use such fees as the said Supreme Court may by orders made by the said Court in general term direct.

84. The Judges of the said Supreme Court may appoint such persons, being Barristers-at-law, as they may think fit, to be examiners to take evidence in suits in Admiralty, who shall receive and take such fees as the said Supreme Court shall by general rules or orders fix and determine.

## GENERAL PROVISIONS.

85. [Reporter to be appointed.]

86. All persons authorized to take affidavits in any of the Superior Courts of any Province may administer affidavits sworn in such Province in the said Supreme Court.

87. All persons being Barristers or Advocates in any of the said Provinces shall be admitted by the said Supreme Court sitting in general term to practice as Barristers and Counsel at the bar



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of the said Court, and before the Judges thereof, upon paying such fees as the said Court shall by its general rules or orders fix and determine, and upon signing a roll to be kept in the custody of the Registrar of the said Court amongst the records thereof, to be called "The Barristers' Roll."

88. All persons being Attorneys, Solicitors or Proctors of the Superior Courts of any of the said Provinces shall be admitted to practice as Attorneys, Solicitors and Proctors in the said Supreme Court, upon taking such oath and paying such fees as shall by the said Supreme Court be prescribed and fixed, and upon signing a roll to be kept in the custody of the Registrar of the said Court amongst the records thereof, to be called "The Roll of Attorneys and Solicitors."

89. [Judges to make rules of procedure as well in appellate as original jurisdiction, but which shall not vary or in any way alter or affect any provision of the code of procedure of the Province of Quebec.

90. This Act shall come into force so soon as His Excellency the Governor General shall issue his proclamation so declaring.

91. This Act may be cited as "The Supreme Court Act."

## SELECTIONS.

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The Commissioners appointed to "inquire into the operation and effect of the present constitution" of the Court of Chancery, the Superior Courts of Common Law, the Central Criminal Court, the Courts of Admiralty, Probate, and Divorce, the Admiralty of the Cinque Ports and the Common Pleas of Lancaster and Durham, and the Courts of Error and Appeal from all the said Courts, have made their first Report. Whether the Court of Chancery of Lancaster was excluded from the purview of the Commissioners advisedly or *per incuriam* we do not know; but at any rate there is no mention of that court either in the Commission or the report, an omission at which we feel the more regret because we had been led to expect that a most important and beneficial change in the character and constitution of that court would have been recommended.

It is not necessary, writing as we do for the profession rather than the public, to say a word in explanation, either of the importance of the questions submitted to this Commission, or (beyond the pure recital of the Commissioners' names) its fitness for the task imposed upon it. The Commission as nominated consisted of Lord Cairns, Sir William Erle, Lord Penzance (then Sir J. P. Wilde), The Lord Chancellor (then Vice-Chancellor Wood), Mr. Justice Blackburn, Mr. Justice Montague

Smith, Sir J. B. Karslake (then Attorney-General), Sir Roundell Palmer, Vice-Chancellor James (then Vice-Chancellor of Lancaster), J. R. Quinn, Q.C., Mr. Registrar Rothery, Mr. Acton Smee Ayrton, Mr. Ward Hunt (since Chancellor of the Exchequer), Mr. Childers (now first Lord of the Admiralty), Mr. Hollams (Thomas & Hollams), and Mr. Francis Dobson Lowndes (Lowndes & Lowndes). Very shortly afterwards it appears to have been thought that the chancery element was too strong on the Commission, for the civil and common law elements were strengthened by the addition of Sir Robert Phillimore and Mr Baron Bramwell respectively, while the country solicitors were represented by Mr. William Gandy Bateson, of Liverpool. Finally, since the last change of Government the names of the present Attorney and Solicitor-General have been added.

The Report before us is signed by everyone of these gentlemen, though some of them have (as might among so many have anticipated) appended to their signatures certain notes either qualifying their concurrence in or signifying their dissent from some of the recommendations.

The Report opens with a concise and lucid account of the origin, progress, and present state of the various distinctions of jurisdiction now existing, and expresses an opinion (not exactly in terms but in substance) that the attempts made in the various Common Law Procedure and Chancery Amendment Acts to remedy the inconveniences arising therefrom are defective in principle as well as deficient in extent, and it illustrates the completeness of the separation between the different jurisdictions, even when they appear to be most intimately "fused," by a reference to the present state of county court jurisdiction which is so completely apposite, and so incapable of condensation, that we give it entire:—

"The county court has jurisdiction in common law cases up to £50 in contracts, and to £10 in torts. It has also equitable jurisdiction in certain cases when the value of the property in dispute does not exceed £500, and in at least one of such cases, namely, an administration suit, it is now competent for any county court judge to restrain the prosecution of actions brought by creditors in any of the Superior Courts of Common Law. By an Act of Parliament of last session some of the county courts have also been invested with Admiralty jurisdiction in a large class of cases, where the amount in dispute does not exceed, in some cases, £150, and in others £800. There is an appeal in each class of cases, within certain limits, to a Court of Common Law, to the Court of Chancery, or to the Court of Admiralty. But these jurisdictions, though conferred on the same court and the same judge, still remain (like the common law and equity sides of the old Court of Exchequer,) quite distinct and separate. The judge has no power to administer in one and the same suit any combination of the different remedies which belong to his three jurisdictions, however convenient or appropriate such redress may be. That can only be accomplished under the county court system, by three distinct suits brought in

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the same court and before the same judge, carried on under three different forms of procedure, and controlled by three different courts of appeal. In this case, therefore, although we appear at first sight to have obtained that great desideratum, which the Common Law Commissioners call 'the consolidation of all the elements of a complete remedy in the same court,' yet, as that remedy can only be had in three separate suits, the evil is equally great."

The Report having thus pointed out the existing evils, proceeds to recommend their remedy. This we think it expedient to give in the Commissioners own words:—

We are of opinion that the defects above adverted to cannot be completely remedied by any mere transfer or blending of jurisdiction between the courts as at present constituted; and that the first step towards meeting and surmounting the evils complained of will be the consolidation of all the Superior Courts of Law and Equity, together with the Courts of Probate, Divorce, and Admiralty, into one court, to be called "Her Majesty's Supreme Court," in which court shall be vested all the jurisdiction which is now exercisable by each and all the Courts so consolidated.

This consolidation would at once put an end to all conflicts of jurisdiction. No suitor could be defeated because he commenced his suit in the wrong court, and sending the suitor from equity to law or from law to equity, to begin his suit over again in order to obtain redress, will be no longer possible.

The Supreme Court thus constituted would of course be divided into as many chambers or divisions as the nature and extent or the convenient despatch of business might require.

All suits, however, should be instituted in the Supreme Court, and not in any particular chamber or division of it; and each chamber or division should possess all the jurisdiction of the Supreme Court with respect to the subject-matter of the suit, and with respect to every defence which may be made thereto, whether on legal or equitable grounds, and should be enabled to grant such relief or to apply such remedy or combination of remedies as may be appropriate or necessary in order to do complete justice between the parties in the case before the Court, or, in other words, such remedies as all the present Courts combined have now jurisdiction to administer.

We consider it expedient, with a view to facilitate the transition from the old to the new system, and to make the proposed change at first as little inconvenient as possible, that the Courts of Chancery, Queen's Bench, Common Pleas, and Exchequer, should for the present retain their distinctive titles, and should constitute so many chambers or divisions of the Supreme Court; and as regards the Courts of Admiralty, Divorce, and Probate, we think it would be convenient that those courts should be consolidated, and form one chamber or division of the Supreme Court.

It should further be competent for any chamber or division of the Supreme Court to order a suit to be transferred at any stage of its progress to any other chamber or division of the court, if it appears that justice can thereby be more conveniently done in the suit; but except for the purpose of obtaining such transfer, it should not be competent for any party to object to the prosecution of any suit in the particular chamber or

division in which it is being prosecuted, on the ground that it ought to have been brought or prosecuted in some other chamber or division of the court. When such transfer has been made, the chamber or division to which the suit has been so transferred will take up the suit at the stage to which it had advanced in the first chamber, and proceed thenceforward to dispose of it in the same manner as if it had been originally commenced in the chamber or division to which it was transferred."

That this, or something tantamount to this, is the true remedy for which we have so long been seeking, we have little doubt; and although not the same in form, it is practically the same thing on a more complete scale as the proposition made some years ago in this journal, that no suit in equity should fail solely on the ground that the remedy was at law, but that the Court should have power on motion at any time before issue joined (but not after) to remove the record into a court of law, which should try the questions arising upon the pleadings as issues to be settled, if necessary, by the judge, on the system now, or lately, prevailing in Ireland. The only practical difference between the two suggestions is that that of the Commissioners embraces "all courts and causes whatsoever," and is put into a form apt for that purpose, whereas we had only under consideration the particular case of a suit in equity, and proposed a remedy adapted to that case only.\*

The report then takes up the question, which the Commissioners describe as "important and difficult," as to the number of judges who should ordinarily sit together, and they come to the conclusion that for a court of first instance a single judge is sufficient, although they recommend that for the present the system of sitting in banco in Courts composed of *not more than* three judges should be continued in the common law divisions of the Court. From this recommendation we feel compelled, not without hesitation and reluctance, to dissent: we entertain a strong opinion that no final decree or order whatever should be made, except by consent of the parties, by a single judge, and that instead of extending the system now prevailing in chancery to the common law divisions of the proposed Supreme Court, it would have been better to constitute a full Court, consisting of *not less than* (instead of "not more than") three judges, who should hear and determine all contested causes. As the details of our proposal for this purpose, showing that it would not require any greater addition to the

\* In fact, our remarks were caused by the result of a suit then recent, in which, after the cause had been duly brought to the hearing, and both sides had gone at great length and considerable expense into the merits of their respective cases, the Vice-Chancellor (Wood), after expressing a strong opinion that the plaintiff was right on the merits, felt himself obliged to dismiss the bill with costs, because the bill of exchange, to restrain the negotiation of which the suit was brought, had been, in fact, discounted a day or two before the bill was filed, so that, at the time of the institution of the suit, the plaintiff's was "a mere money demand."—E. A. M.

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number of the Bench than that proposed by the Commissioners, is already† before our readers, we need say no more here than that we think that, in this respect at any rate, equity should "follow the law," not *vice versa*.

The Report then goes on to consider a scheme for uniformity of procedure. We were at first much startled at this proposition, because we are fully persuaded that diversity, and not uniformity of practice, is essential, not merely in legal but in all human affairs of importance, to meet the endless variety of circumstances, complications, and dispositions which are to be provided for in all human systems, legal, social, political, or ecclesiastical. Upon further examination, however, we found that this proposed uniformity was only to be superficial, and that underneath was to be preserved all the existing diversity of procedure, with this difference—that the question, to which kind of operation any cause is to be submitted, is to be determined henceforth by the nature of the question to be tried, not by the constitution of the tribunal before which it is brought. This is an undoubted improvement; a necessary consequence, indeed, of the power of transfer already mentioned, but not the less important to bear in mind as the *principle* to which all recommended systems of pleading and practice should be referred, which may be shortly stated thus;—differing methods of investigation are adapted for the determination of different questions, and it is the duty of the Court, as soon as it has discovered the nature of the question or questions at issue, to apply to the case that form of procedure best adapted to produce the desired result. We fully agree, however, with what we understand to be the view of the Commissioners, that this diversity should be confined within as narrow limits as is conveniently practicable, and we therefore hail with pleasure the recommendations—first, that all suits should be commenced by a document of a single nature, and secondly, that there should be a power of adapting this document by special endorsement to various circumstances and with various results.

The recommendations on this point may be shortly described as follows:—all suits are to be commenced by writ of summons, but whenever the claim is a liquidated money demand, or for an account, the writ is to be specially endorsed: and judgment to be recoverable at once in default of appearance, either for payment of the demand or for taking the account, as the case may be; and even after appearance, there is to be provided a summary method of arriving at the same result, unless upon cause shown a different order is made.

Next in order comes the question of pleading in cases not disposed of summarily under the preceding provisions. Here, again, the Commissioners appear to have been anxious to preserve as much uniformity as possible, and we are not quite sure that they have not for

this purpose gone somewhat further than convenience would altogether dictate. After some preliminary observations to the effect that common law pleading as now carried on is unintelligibly technical, and equity pleading intolerably prolix, (neither of which propositions are, we think, true to their full extent,) the Report proceeds:—

"The best system would be one which combined the comparative brevity of the simpler forms of common law pleading with the principle of stating, intelligibly and not technically, the substance of the facts relied upon as constituting the plaintiff's or the defendant's case, as distinguished from his evidence. It is upon this principle that most modern improvements of pleading have been founded, both in the United States and in our own colonies and Indian possessions, and in the practice recently settled for the Courts of Probate and Divorce. We recommend that a short statement constructed on this principle of the facts constituting the plaintiff's cause of complaint, not on oath, to be called the declaration, should be delivered to the defendant. Thereupon the defendant should deliver to the plaintiff a short statement, not on oath, of the facts constituting the defence, to be called the answer. When new facts are alleged in the answer the plaintiff should be at liberty to reply. The pleadings should not go beyond the reply, save by special permission of a judge; but the judge should, at any stage of the proceedings, permit such amendment in or addition to the pleadings as he may think necessary for determining the real question or controversy between the parties, upon such terms, as to costs and otherwise, as he may think fit."

Then, after a proposal (in which we heartily concur) for enabling any cross claims which might have the operation of a set-off to be made by answer, without a cross suit, and for enabling either party to add parties for the purpose of bringing before the Court all persons interested in the subject-matter, the Report proceeds:—

"We think that either party should be at liberty to apply at any time, either before or after pleading, for such order as he may upon the admitted facts in the case be entitled to, without waiting for the determination of any other questions between the parties.

The Commissioners, naturally following the progress of the cause, now come to the question of the mode of trial. And here, for the first time, their recommendations have the qualification (be it merit or otherwise) of absolute novelty. Up to this point nothing has been suggested which has not, in principle at any rate, been prominently urged before; but, so far as we know, the scheme now put forward with all the weight of the unqualified concurrence of all the commissioners is absolutely new to the public. After a succinct account of the different modes of trial at present in vogue, they say:—

"It seems to us that it is the duty of the country to provide tribunals adapted to the trial of all classes of cases, and capable of adjusting the rights of litigant parties in the manner most suitable to the nature of the questions to be tried.

† 12 Sol. Jour. 911.

## THE REPORT OF THE JUDICATURE COMMISSION.

We therefore recommend that great discretion should be given to the Supreme Court as to the mode of trial, and that any questions to be tried should be capable of being tried in any division of the court.

1. By a judge.
2. By a jury.
3. By a referee.

The plaintiff should be at liberty to give notice of trial by any one of these modes which he may prefer, subject to the right of the defendant to move the judge to appoint any other mode. When the trial is to be by a jury or by referee, a judge, on application by either party, if he think the questions to be tried are not sufficiently ascertained upon the pleadings, should have power to order that issues be prepared by the parties, and if necessary settled by himself. The judge should also, on the application of either party, have power to direct that any question of law should be first argued, that different questions of fact arising in the same suit should be tried by different modes of trial, and that one or more questions of fact should be tried before the others.

The system which, in all the divisions of the Supreme Court to which it can be conveniently applied, we would suggest for the trial of matters suitable for trial by referees, is as follows:—

We think that there should be attached to the Supreme Court officers to be called official referees, and that a judge should have power, at any time after the writ of summons, and with or without pleadings, and generally upon such terms as he may think fit, to order a cause, or any matter arising therein, to be tried by a referee: and that whenever a cause is to be tried by a referee, such trial should be by one of these official referees, unless a judge otherwise orders. We think, however, that a judge should have power to order such trial to be by some person not an official referee of the court, but who on being so appointed should *pro hac vice* be deemed to be and should act as if he were an official referee. The judge should have power to direct where the trial shall take place, and the referee should be at liberty, subject to any directions which may from time to time be given by the judge, to adjourn the trial to any place which he may deem to be more convenient.

The referee should, unless the judge otherwise direct, proceed with the trial in open court, *de die in diem*, with power however to adjourn the further hearing for any cause which he may deem sufficient, to be certified under his hand to the court.

The referee should be at liberty, by writing under his hand, to reserve, or pending the reference to submit, any question to the decision of the Court, or to state any facts specially with power to the Court to draw inferences; and the verdict should in such case be entered as the Court may direct. In some other respects the decision of the referee should have the effect as a verdict at *Nisi Prius*, subject to the power of the Court to require any explanation or reasons from the referee, and to remit the cause or any part thereof for reconsideration to the same, or any other referee. The referee should, subject to the control of the Court, have full discretionary power over the whole or any part of the costs of the proceeding before him.

In connection with the subject of trial, it seems proper to refer to the recommendation of the

Patent Law Commissioners in the report of the 29th July 1864, who, after observing that the present mode of trying the validity of patents is not satisfactory, advise, that such trials should take place before a judge, sitting with scientific assessors to be selected by himself in each case, but without a jury, unless at the desire of both parties to the suit; and that on such trials the judge, if sitting without a jury, should decide questions of fact as well as of law. It appears to us that a plan similar in substance to that recommended by the Patent Law Commissioners, might with advantage be applied to the trial, not of patent cases only, but of any cases involving questions of a scientific or technical character, in which the judge, or the referee by leave of the judge, may think it desirable to have the aid, during the whole or any part of the proceedings, of scientific assessors."

With this proposal, with one or two slight modifications, we entirely concur. We have already\* given our reasons for disapproving of the trial of contested points of law before a single judge, and we think that it is even more objectionable to submit to a single mind the duty of deciding, upon conflicting evidence, disputed questions of fact; and we could therefore reserve to either party the right, *ex debito justitiæ*, to have all issues of the former kind referred to a Court, to consist, in the first instance, of three judges at the least, and to have all issues of the latter kind settled by the verdict of a jury: this right is by the proposal above-quoted left to the Court in its discretion, but we think that it ought to be vested absolutely in either party, and that the discretion of the Court should be limited to those cases in which the questions of law and fact are so blended as to be undistinguishable. On the subject of referees, also, we think that the report requires some qualification. We think that no case should be referred, except by consent, in any case where the order goes beyond "accounts and inquiries," but that the Court should have the fullest authority to order all such matters to be referred instead of prosecuting the inquiries itself or in chambers. The referees, however, (official or other), should be strictly limited to finding the facts, and should not, in the absence of agreement, be competent to make any final award; the Court, applying the law to the facts certified by the referees, should make the order, in the same manner as an order founded upon the certificate of the chief clerk is now made on the further consideration of a suit in chancery. We think also that provision should be made for the selection of the official referees partly from the profession and partly from the classes who now supply what is known as "expert evidence," with power from the Court to associate a legal and scientific referee or referees in any case, much as is now done in the Court of Admiralty on a reference to the "registrar and merchants." This would, we think, be preferable to leaving the legal referee uncontrolled by the opinions—save in so far as he

\* *Uti Sup.*

## THE REPORT OF THE JUDICATURE COMMISSION—INTERROGATORIES.

felt bound *verecundia* caused to defer to them—of scientific assessors.

In the same manner, without at all desiring to trench upon the power of the Court to sit with the assistance of assessors merely, we think it would be advantageous to enable the parties to require issues of fact involving special knowledge to be referred to a specially qualified jury of some limited number (say five), and to render their verdict (at all events when unanimous) absolutely and finally binding upon the parties. We say "when unanimous," because we think that such a jury ought to be entrusted with the power of finding a verdict by a majority, irrespective of consent, with, perhaps, the qualification that the Court, if dissatisfied with the verdict, might in such a case set it aside and order a new trial on the ground of such difference of opinion alone.

The Commissioners next take up the question of evidence, and upon this point we do not exactly understand their proposal.

They recommend that—

"In the absence of any agreement between the parties, and subject to any General Order of the Court applicable to any particular class of cases, the evidence at the trial should be by oral examination in open court, but that the Court should have power at any time to direct that the evidence in any case, or as to any particular matter at issue, should be taken by affidavit, or that affidavits of any witnesses may be read at the trial, or that any witnesses may be examined upon interrogatories or otherwise before a commissioner or examiner. Any witness who may have made an affidavit should be liable to cross-examination in open court, unless the Court or a judge shall direct the cross-examination to take place in any other manner. Upon interlocutory applications, the evidence should, we think, as a general rule be taken by affidavit, but the Court or a judge should upon the application of either party have power to order the attendance, for cross-examination or otherwise, of any person who may have made an affidavit."

If this means that wherever there is a dispute of fact the evidence *upon that issue* is to be taken orally in court, but that all subsidiary facts not in issue, and all formal proof of facts not really contested, may be given by affidavit, we fully agree with it, but if and so far as it may mean anything else we are unable to concur with it. We think that one of the principal objections—we had almost said the principal objection—to the existing common law system is the necessity for bringing witnesses, often at enormous expense, into court to prove every link in a long story of which perhaps but one or two points, depending often upon the evidence of a single witness, are really in contest; while, on the other hand, we believe it to be the unanimous opinion of all who have any personal experience of its working that no more solemn farce exists than a cross-examination in chancery before an examiner, ordinary or special. It would be utterly ludicrous were it not so terribly expensive.

The Report then proposes to give to the Court or judge very extensive discretionary powers, to which no objection can, we think, be taken, followed by a proposal\* that "in all divisions of the Supreme Court the costs of the suit and of all proceedings in it should be in the discretion of the Court." As this is coupled with a proposal† that, "as a general rule, no appeal should be allowed as to costs only," we are constrained to object to it as vesting in the hands of a single judge a power which obviously may be, and where it exists not unfrequently is, used very arbitrarily, and even harshly, against suitors with whose conduct, on some point immaterial to the issue, the judge is dissatisfied, and whom, though he cannot deny their right to success in the suit, he punishes by the denial of their costs, knowing that of that decision there is no chance of reversal, though often such a victory is worse than a defeat. Nay, we have known more than one instance in which counsel, feeling morally certain of success on the merits, but knowing that the judge had a strong feeling against the case, have felt obliged to deprecate a successful decision, and actually to ask for an appealable decree, a request not invariably acceded to. We confess we cannot see any reason for the rule, and we are sure that it often operates to produce great injustice. Let us take as an instance a case which has been recently much before the public—*Martin v. Macknochie*. If the learned Dean of the Arches had decided against Mr. Macknochie on *all* the questions submitted to him, but added, "I do not, however, consider it a case for costs," Mr. Martin would have been without remedy, though in the opinion of the Court of Appeal (which must, of course, be presumed to be right) he was entitled to all his costs.‡

For so far (with the exception of a protest from the learned judge of the Court of Admiralty against the abolition of the exclusive jurisdiction of that Court, in which few, if any, will, we think, be found to follow him) the Commissioners appear to be perfectly unanimous. At this point, however, they enter upon a new field of inquiry, "the general arrangements for the conduct of judicial business," and from this point there appears to be some difference of opinion amongst them, though not perhaps so great as might reasonably have been anticipated.—*Solicitors' Journal*.

## INTERROGATORIES—TENDENCY TO CRIMINATE.

*Villeboisnet v. Tobin and Others*, C. P., 17 W. R. 322.

This is another decision on the much argued question whether interrogatories the answers

\* Page 15.

† Page 24.

‡ We are not, of course, here expressing any opinion whatever on the merits of this case; we are merely considering its operation on the question of costs.—*Ed. S. J.*

## THE PERILS OF ARBITRATION—EX-CHIEF JUSTICE LEFROY.

to which may criminate the person interrogated may be administered, or whether such a tendency in the interrogatories is a sufficient objection to them. Several cases have been lately before the Courts in which this point has been in dispute, and the decisions are by no means uniform. The result, however, of *M'Fadden v. The Mayor &c. of Liverpool* (16 W. R. 1212) and *Edmunds v. Greenwood* (17 W. R. 142), the two cases which immediately preceded *Villeboisnet v. Tobin*, appeared to be that it is no objection to interrogatories that they may criminate, but if the direct object is to criminate they will not be allowed. This view of the law is now further sanctioned by the decision in *Villeboisnet v. Tobin*, where it was held in an action for misrepresentations in a prospectus that interrogatories should not be allowed which inquired into the truth or falsehood of the alleged misrepresentations.

Montague Smith, J. says—"The only intelligible rule to be deduced from all the cases, including *Edmunds v. Greenwood*, seems to be that where interrogatories are *bond fide* put to elicit what is relevant to the issue they may be allowed, though the answers may tend to criminate, giving the party interrogated the option of answering or refusing to answer on that ground. But when interrogatories are so put the Court and the judge at chambers will require a stronger case and stronger reasons than in other cases. These interrogatories should not in ordinary cases be allowed on the ordinary affidavit only, but special circumstances must be laid before the judge to induce him to allow them."

This judgment is quite in accordance with *Edmunds v. Greenwood*, and with the decisions which are cited and discussed in the considered judgment of the Court in that case. There seems to be no doubt that the law now is that interrogatories will not be allowed if their direct object is to criminate; but if they are put *bond fide* for the purpose of discovering matters relevant to the issue it is not a sufficient objection to them that they tend to criminate if there are any special reasons why such interrogatories should be allowed, and such reasons are properly brought before the judge at chambers on affidavit.—*Solicitors' Journal*.

## THE PERILS OF ARBITRATION.

Tribunals of arbitration are, both in the legal and commercial world, rising in favour; and their great value has been authoritatively recognised in that portion of the Report of Judicature Commission which seeks to establish official referees. Yet, as the law stands, there is considerable peril in a resort to such such tribunals. If a judge goes wrong in his law at *Nisi Prius*, or a jury blunders, there is ample means of setting the error right. But it is a very old principle that the award of an

arbitrator is final, and not open to review, except where the mistake of the arbitrator is apparent on the face of the award, where he has exceeded or failed to exercise his jurisdiction, or where he has been guilty of misconduct. Yet independently of such cases, injustice may occur. In a case of *Flynn v. Robertson*, referred to a Master of the Common Pleas, it was admitted on both sides that a sum of about 40*l.* was due from the defendant to the plaintiff. The Master found that nothing was due, and condemned the plaintiff in costs. A rule *nisi* was obtained to refer the matter back to the Master, and the Master informed the Court that he had made a mistake, and that he wished the matter sent back. Upon cause being shown against the rule, it was contended that, however gross the injustice might be, the Court had no power to set aside or send back the award. At the same time it was stated that the defendant, to meet the fairness of the case, had offered 40*l.* in settlement of the whole matter. Counsel for the defendant showed that the present rigour of the law was established by the judgment of of Baron Parke in *Phillips v. Evans*, 12 M. & W. 309, and that his ruling had been followed in *Hogkinson v. Fernie*, 3 C. B. N. S., and in a recent Irish case. It is hardly necessary to remark that, in the present day, the Courts lean in favour of doing justice to the parties, and endeavour to break through iron rules which have the direct effect of bringing scandal on the law by working a clear wrong. Actuated by this principle, the Court made the rule absolute, adopting a doctrine that a case shall be sent back when the arbitrator himself states that he has made a mistake. Their Lordships fortified themselves in their decision by what was said by Lord Denman in *Hutchinson v. Shepperton*, 18 Q. B., and by Vice-Chancellor Wood in 18 Kay and J., 66. To have adhered to an old rule, at the hazard of doing what was in the highest degree inequitable, would have tended to throw discredit on a judicial instrument which in the future is destined to prove even of higher advantage than it has in the past.—*Law Journal*.

## EX-CHIEF JUSTICE LEFROY.

On Tuesday last died Thomas Lefroy, the late ex-Chief Justice of Ireland, at the age of ninety-three. Three years ago he was on the bench, and his friends assure us that his faculties were unimpaired to the last.

Mr. Lefroy, who was the eldest son of Mr. Anthony Lefroy, of Carrickglass, was born in the year 1776. He took his bachelor's degree at Trinity College in 1786, and was called to the bar in 1797. He soon had an excellent equity practice. He became a bencher of the King's Inns, a King's Serjeant, and a King's Counsel. In 1830 he entered Parliament as member for the University of Dublin. He was from the outset of his public career a staunch Tory. He represented the University

C. L. Cham.]

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for eleven years. He was appointed by Sir Robert Peel one of the Barons of the Exchequer, and in 1852—being then in his seventy-sixth year—he was promoted by Lord Derby to the post of Lord Chief Justice of the Queen's Bench. He retired in 1866, when in his ninetyeth year.

The late venerable Ex-Chief Justice was married in 1799 to Mary, daughter of Mr. Jeffrey Paul. His eldest son is Mr. Anthony Lefroy, M.P. for the University of Dublin.—*Law Journal*.

## ONTARIO REPORTS.

### COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

#### HOLMES V. REEVE.

*Certiorari to remove case from Division Court.*

- Held*, 1. The mere fact that a judge of a Division Court has expressed an erroneous opinion in a case before him is no ground for its removal by certiorari.
2. Where a defendant knows all the facts of a case before the day of trial, but, nevertheless, argues the case and obtains an opinion from the judge, the case should not be removed, and the fact that the judge is desirous that the case should be disposed of in the Superior Court can make no difference.

[Chambers, March 15, 1869.]

This was an action brought on a promissory note for sixty-eight dollars, made by the defendant, and was placed in suit in the third Division Court of the County of Huron, and the summons was served for the Court to be holden on 25th January, 1869.

The defendant obtained a summons for a writ of *certiorari* to remove the case from the said Division Court into the Court of Common Pleas, on the ground that difficult questions of law were likely to arise.

One of the affidavits upon which the summons for the *certiorari* was granted was made by Mr. Sinclair, attorney for the defendant, and was as follows: "That the said judge reserved his judgment on said evidence, and the points raised from the twenty-fifth day of January last until the sixth instant, and from then until the thirteenth day of February, instant, when I attended before him, and he expressed a desire to have a short time longer for consideration, and he suggested the eighteenth day of February, instant, as the day he would be prepared to give his judgment: that on said last mentioned day I attended before the said judge, and Mr. Elwood appeared for the plaintiff, when the judge of said Division Court expressed his opinion adversely to the defendant: that he did so with great hesitation, as he expressed it, on the ground that the decisions bearing on the point appeared contradictory, that I suggested to the said judge the propriety of his delaying his delivery of judgment until I had an opportunity of applying for a *certiorari* to remove the case to one of the superior courts of law, the case being one of great importance to the defendant, and one involving some questions of law which had not then come up for decision in any of the superior courts of law in the manner raised by the facts of this case: that

the said learned judge remarked that he certainly thought it a fit case to be removed by *certiorari* and would grant time to enable me to apply therefor, and postponed the delivery of judgment until the fourth day of March next, for the purpose of such application."

The plaintiff's attorney, in his affidavit filed on shewing cause, swore "That on the return of the said summons (in the Division Court) the said John Reeve appeared, and also the said Richard Holmes: that James Shaw Sinclair, of the said town of Goderich, Esquire, appeared as counsel for the said John Reeve, and I this deponent appeared as counsel for the said Richard Holmes: that the said cause was duly called on for hearing on that day before Secker Brough, Esq., judge of the County Court of the County of Huron, who is also the judge of the said third Division Court: that after the said case had been thoroughly gone into, and after several witnesses were examined, both on behalf of the said Richard Holmes and the said John Reeve, and after a lengthy legal argument had taken place, and when the said judge had expressed his opinion that his judgment should be for the said Richard Holmes, and just as he was about to endorse his said judgment on the said summons, the said James Shaw Sinclair got up and asked and pressed on the said judge, that if he would not then enter his judgment but would defer same to some future day, he could produce to him authority to shew that in law he was entitled to his judgment: that the said Judge, in pursuance of the said request, adjourned the said cause until the sixth day of February: that on that day the said Mr. Sinclair on behalf of the said John Reeve, and John Y. Elwood, of the said town of Goderich, barrister-at-law, my partner, on behalf of the said Richard Holmes, appeared before said judge, and further argued the said case. That after hearing the said argument, the said judge informed the said parties that he would be prepared to give his judgment on the thirteenth day of February: that on that day the said Sinclair and Elwood appeared before the said judge to hear his said judgment, but he not being prepared to give it then, said he would give same on the eighteenth day of February."

It also appeared from another affidavit, that on the 18th February, the learned judge said he was then prepared to deliver his judgment, and then proceeded to deliver, and did deliver the same; and said that "in his opinion the plaintiff Richard Holmes was entitled to his judgment," and then proceeded to give, and did give his grounds for said judgment, and reviewed the authorities cited to him on the said argument: that after the said judge had delivered his said judgment, Mr. Sinclair, on behalf of the said John Reeve, applied to, and urged upon the said judge not to endorse his judgment on the back of the said summons, but to refrain from doing so until the fourth day of March instant, as in the meantime he would apply for a writ of *certiorari* to remove the said plaintiff.

Spencer shewed cause, and contended that the application was made too late, the case having been considered by the judge of the court below and judgment in effect given though not formally entered: *Black v. Wesley*, 8 U. C. L. J. 277; *Gallagher v. Bathie*, 2 U. C. L. J. N. 8. 73.

C. L. Cham.]

HOLMES v. REEVE—IN RE DAVY.

[C. L. Cham.]

*John Patterson, contra*, urged that the judge had given no judgment, and had expressly postponed his decision to enable the *certiorari* to be applied for. He had merely expressed an opinion. He cited *Pateron v Smith*, 14 U. C. C. P. 525.

RICHARDS, C. J.—On principle I do not think this case ought to be removed from the Division Court. If the case was one fit to be tried before the judge of that court, the mere fact that he may have formed and expressed an opinion which was erroneous, is no ground for taking the case into the Superior Court. The defendant knew all the facts of the case before the day of trial, and if it was considered it ought to have been removed from the Division Court, steps should have been taken for that purpose before it was heard.

It seems to me to be an unseemly proceeding, that the defendant, after having argued the matter before the judge, and obtained his opinion, and having had the cause adjourned for the purpose of furnishing new authorities, and after consideration of those authorities, the judge had expressed an opinion, that the case should then be taken out of his jurisdiction by a *certiorari*. The fact that the judge himself may have been willing or even desirous to have the matter disposed of in the Superior Court can make no difference. After he has taken on himself the burthen of disposing of the case, having heard the evidence, and expressed his opinion, I do not think, as a general rule, a *certiorari* ought to issue. The cases of *Black v. Wesley*, 8 U. C. L. J. 277; *Gallagher v. Bathie*, 2 U. C. L. J. N. S. 78, seem to me to lay down principles inconsistent with removing this case. The case of *Patterson v. Smith*, 14 U. C. C. P. 525, does not, I think, lay down any doctrine contrary to that of the other cases referred to, for although there had been an abortive attempt to have a trial there was no verdict, and the court no doubt looked at that case in the same way as if no jury have been sworn at all.

I think the summons should be discharged on the grounds I have mentioned, but as the learned judge of the County Court delayed the entry of judgment to enable the defendant to make this application, it will be without costs. I arrive at this conclusion as to the costs more readily from the fact that one of the affidavits filed on behalf of the plaintiff states the belief of the deponent, that the attorney for the defendant speculated on the chance of getting a decision in his favor, and it being against him, he now makes this application. I do not see how this statement thus made was calculated to be of any service to the plaintiff; the way in which it is made is not likely to keep up kindly feelings between professional gentlemen practicing in the same town. No particular grounds seem to be referred to in the affidavit as justifying the belief expressed, though no doubt the person making the affidavit entertained such belief. If the facts stated in the affidavit justify the inference, it will generally be better to place that inference before the court as a matter of argument and conclusion to be drawn from facts rather than as a fact in the affidavit, which the deponent swears he believes.

*Summons discharged without costs.*

## IN RE DAVY.

*Costs—Taxation—One-sixth struck off.*

Where a sum had been abandoned by an attorney after a summons taken out for the taxation of his bill, but before actual taxation; this abandonment is not to be taken into consideration by the master in settling whether one-sixth has been taxed off the bill.

[Chambers, March 15, 1869.]

A summons was taken out to tax costs of the defendant's attorney against his client, in a suit of *Ham v. Eliza Amey*, but before the taxation took place, the attorney abandoned an item of \$20 in his bill.

The effect of this abandonment was, that the bill was reduced by more than one-sixth, and the master in settling the costs of taxation, decided that the position of the attorney was no better than if the item had been merely struck off on taxation, and he charged the attorney with the costs of taxation.

The attorney thereupon obtained a summons calling on the client to show cause why the master should not be directed to review his taxation; and why he should not be directed upon such review to disallow to the said Eliza Amey her costs of the said reference, and to tax to the said attorney his costs of the said reference, on the ground that the said master has not taxed off one-sixth of the amount of the said bill referred to him for taxation, after taking into account the amount abandoned thereupon by the said attorney. Or why the said order made in this matter for reference to taxation, should not be amended by inserting therein, a direction to the master to take into his consideration, in determining by whom the costs of the said reference should be paid, the fact of the abandonment of the sum of twenty dollars from the said bill by the said attorney, and his offer to pay the said Eliza Amey her costs of the summons for taxation of the said bill. And why the said Eliza Amey should not bring into court the original order, for the purpose of amending the same as aforesaid. And why upon such amendment being made therein, the said master should not be directed to reconsider his allocatur and his taxation of the costs of the reference, and disallow the said Eliza Amey the whole or any part of the costs of such reference, and allow to the attorney the whole or any part of his costs of the said reference, or otherwise alter his said allocatur as he might be advised on grounds disclosed in affidavit and papers filed. The said attorney to have leave to file a copy of the said master's allocatur on the return hereof; or why such other order should not be made in the premises as to the said presiding judge should deem proper.

*Oster* shewed cause, citing Con. Stat. U. C. cap. 8, secs. 27, 28, 31; 1 Ch. Arch. Pr. (12 ed.) 124; *In re Davy*, 1 U. C. L. J., N. S. 213, and cases there referred to.

*Holmsted* for the attorney, *contra*, cited *Ecollier v. Dutour*, 1 Barnes' notes, 128.

RICHARDS, C. J., discharged the summons with costs.

*Summons discharged with costs.*



C. L. Cham.]

MCGREGOR V. SMALL—CAMPBELL V. MATHEWSON.

[C. L. Cham.]

## MCGREGOR V. SMALL.

*Examination of insolvent debtor—Effete order.*

An execution creditor cannot examine a judgment debtor on a stale order which has been partially acted upon.

[Chambers, March, 15, 1869.]

On the 26th of February, 1867, an order was made for the examination of the defendant touching his estate and effects before the deputy clerk of the Crown, for the County of Frontenac. Upon this an appointment was a few days afterwards made, which was served on the defendant together with the order. An arrangement was subsequently made between the parties for the payment of the judgment debt by instalments, and though some of the debt was paid pursuant to such arrangement, the defendant made default in his promises of payment, and execution was issued for the balance due, the result of which was an interpleader issue to test the right of a claimant to the goods seized, which was still pending. On the 10th of March, 1869, the plaintiff obtained from the deputy clerk of the Crown, and served on the defendant, another appointment for the 12th of March, 1869, on the order of the 26th of February, 1867.

The defendant then obtained a summons to shew cause why the order of the 26th of February, 1867, and the last appointment thereunder, or the said appointment alone should not be set aside on the ground that the said order was effete and lapsed, a previous appointment having been made thereon, and that it had been waived by delay.

*Oslar* shewed cause. The first appointment was never acted upon, and the proceedings were stayed at defendant's request and for his benefit, and he cannot be heard now to object to proceedings on this order. There is no time limited within which those orders can be acted upon.

*O'Brien contra*, the order has been acted on and is effete. This attempted proceeding would, if successful, give the plaintiff a new order for the examination of the defendant, without giving the latter an opportunity of shewing cause why he should not be examined. The circumstances of the case may have so changed that a judge would not grant an order for examination. There is, in fact, an interpleader issue about to be tried, which may result in the payment of the debt, and the object sought to be gained by this examination, viz., to obtain evidence for the execution creditor in the interpleader suit is not a legitimate object.

He cited *Jarvis v. Jones*, 4 Prac. B. 841.

*Richards*, C. J.—The defendant cannot in my opinion be examined on an appointment under an order more than two years old, and which has been partially acted upon. This appointment must be set aside, but I give no costs.

## CAMPBELL V. MATHEWSON.

*Practice in ejectment—Infant plaintiff—Setting aside proceedings.*

An infant plaintiff can sue out a writ of ejectment in his own name, but, after appearance entered, he cannot take any further step, such as giving notice of trial, without having a next friend appointed; and any such further proceedings in the infants own name will be set aside.

[Chambers, May 4, 1869.]

This was an action of ejectment in which notice of trial had been given for the Spring Assizes, for the County of Grey.

*J. A. Boyd* obtained a summons to set aside the notice of trial and notice to admit, with copy and service thereof, and to stay all proceedings till the plaintiff should give security for costs, or a sufficient next friend should be appointed on the affidavit of the defendant, who swore as follows:—

“That the claim of title as to said lot is as follows as I verily believe, from searches made in the proper Registry office: patent of the whole lot to John Gallinger: conveyance from said Gallinger to John Campbell: conveyance of the south half (the premises in question) from said Campbell to John B. Courtemanche, and the said Courtemanche gave back a mortgage conveying the legal estate, and to secure the purchase money to the said John Campbell: that the said Courtemanche, as I am informed and believe, made default in his payments on said mortgage, and, thereupon the said John Campbell exercised a power of sale contained in the said mortgage and sold the said premises by auction sale to his son who was then, and is still, a minor under the age of twenty-one years; namely, the above-named plaintiff, Duncan Campbell, and the premises were so sold to the son of the said John Campbell, for the sum of one hundred and twenty dollars, being an entirely inadequate consideration: that after said sale, the said premises were conveyed to the said plaintiff by his father in pursuance of such sale in or about the year 1864, and I afterwards entered into an agreement with the said John Campbell and his son, the said plaintiff, for the sale and purchase of the said land, and a bond to that effect was duly entered into between us, on the 1st day of May, 1865: that on the ninth day of the present month of December, I made application to the said plaintiff and his father for a deed of the said premises, being then ready and willing to pay all that was due in respect of said premises on the footing of the said bond, but they declined, on the ground that the deed of the said plaintiff would be of no use, as he was under age: that I then made inquiries from the father of the said plaintiff as to the age of the said plaintiff, and he referred to some papers, and read out to me the day of his birth, (which I now forget), and stated that he, (the said plaintiff), would not come of age for a year and a-half.”

Pending this summons, *Oslar* for the plaintiff obtained an order for the admittance of John Campbell, (who was sworn to be worth five hundred pounds), to prosecute the action as the next friend of the plaintiff. On the return of the summons,

*Oslar* shewed cause, and relied upon this order as being an answer to the defendants application, and asked to be allowed to amend the style of cause in the notice of trial, by inserting the name of the next friend. He objected to the delay in making the application, and relied upon the language of *Richards*, J., in *O'Reilly v. Vanevery*, 2 P. R. 184, that in such cases the defendant could obtain security for costs by applying immediately after appearance. He cited *Cole on Ejectment*, 584.

*Boyd*, in support of his summons, contended that the language of *Richards*, J., was *obiter dictum*: that the text writers cited, referred to no authorities, since the action of ejectment was re-

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modelled: that the application was immediately after the first irregular step: that it was not necessary for the defendant to apply immediately after appearance, as it was not to be assumed that the plaintiff would proceed irregularly: that the appointment of next friend could not relate back so as to give validity to previous proceedings, and that the practice in suits by infants when pleadings were filed, was to set aside the proceedings by him after appearance when no next friend had been appointed. He cited *Doe d. Roberts v. Roberts*, 6 Dowl. 556; *Doe d. Selby v. Alston*, 1 T. R. 491; *Major v. McIntire*, Sm. & Bat. 278; *Byrne v. Walsh*, 5 Ir. L. R. 217; *Grady v. Hunt*, 3 Ir. C. L. R. 522.

HAGARTY, C. J. C. P., held, that the notice in question must be set aside, and if costs had been asked for, with costs. It was clear that the infant had the right to issue and serve the writ without the appointment of a next friend, but he could take no further step in prosecution of the suit without such an appointment. The practice which prevails in ordinary actions by infants must apply to actions of ejectment since the Common Law Procedure Act, and in these cases the authorities referred to shewed that any proceeding taken by an infant after appearance, without the intervention of a next friend would be set aside for irregularity if promptly moved against. He did not feel pressed by the language of *Richards, J.* referred to, as it might well be that the defendant could have moved for security after appearance and yet have his remedy open of moving to set aside the first proceeding irregularly taken by the infant. The plaintiff in this case having procured the appointment of a solvent next friend, it will not be necessary to deal with his application for security.

Order accordingly.

#### SYNGE v. ALDWELL.

*Law Reform Act, sec. 18.—Withdrawal of issue to enable plaintiff to give notice for jury.*

The plaintiff obtained a summons, asking amongst other things, to be allowed to withdraw his replication joining issue, and take the same off the files, and file a similar replication with a notice requiring a jury. The joinder of issue had been filed after the Law Reform Act came into force.

GWYNNE, J., gave the leave required.

#### ENGLISH REPORTS.

##### REG. v. ALSOP.

*Perjury—Corroborative evidence—Materiality.*

Upon the trial of C. for perjury, committed in an affidavit, proof was given that the signature to the affidavit was in C.'s handwriting, and there was no other proof that he was the person who made the affidavit. The prisoner was then called, and swore that the affidavit was used before the taxing master; that C. was then present, and that it was publicly mentioned, so that everybody present must have heard it, that the affidavit was C.'s.

Held, that the matters sworn by the prisoner were material upon the trial of C.

[C. C. R. 17 W. R. 621.]

Case reserved by the Recorder of London at

the February Session of the Central Criminal Court, 1869.—

The defendant was at this session convicted before me of wilful and corrupt perjury committed by him in the evidence which he gave before me at the preceding session of this court upon the trial of one James Coutts, for perjury.

Coutts was indicted for perjury, committed in an affidavit made by him in a cause of *Kelsey v. Coutts*, and which affidavit had been afterwards made use of before the master upon the taxation of the costs in the said action.

Proof was given that the signature to the affidavit was in the handwriting of Coutts, but no other proof was given that he was the person who had made the affidavit, the commissioner who administered the oath being unable to identify him. The case of *R. v. Morris*, 1 Leach, 50, was referred to.

The present defendant, John Alfred Alsop, was then called, and swore that the affidavit in question was used before the taxing master upon the adjourned taxation, and that the defendant Coutts was then present, and that it was publicly mentioned, so that everybody present must have heard it, that the affidavit was the affidavit of James Coutts. The indictment against the present defendant Alsop alleged that it was a material question upon the trial of the said James Coutts, whether the said James Coutts was present on the 14th of November before the master on the taxation of the said costs.

And whether or not on the said 14th of November the said affidavit was used and read in the presence of Coutts.

And whether or not on the occasion of the taxation of the said costs it was stated publicly in the presence and hearing of Coutts that the affidavit was his

Upon the trial it was objected that the above-mentioned matters were not material questions for inquiry upon the trial of Coutts, as the particulars sworn to related to matters occurring subsequently to the making of the affidavit, and were tendered merely as collateral proof that the affidavit had been made by Coutts, and that the only matter material for inquiry was the truth or falsehood of the statements contained in that affidavit:

The opinion of the Court for the Consideration of Crown Cases Reserved is requested whether the above-mentioned matters were material to the issue involved in the trial of Coutts, and whether the conviction should stand or be reversed.

The defendant was admitted to bail with sureties for his appearance at the session next after the judgment of the Court is pronounced upon these points.

*Poland*, for the prisoner, submitted that inasmuch as the identity of the person making the affidavit was established by proof of his handwriting (*R. v. Morris*, 1 Leach, 50, 3 Russ. 92), the evidence of the prisoner given subsequently was collateral and immaterial. [*Waddy*, for the prosecution.—At the trial the identity of Coutts was not made out, and then it was that the prisoner supplemented the proof of it.] [BARRR, J.—The jury may have disbelieved the witnesses who gave evidence as to the handwriting.] LUSH, J.—The prisoner's counsel must go to the extent

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of saying that all evidence in corroboration of facts of which other proof has been given is immaterial.]

*Waddy*, for the prosecution, was not called on.

**KELLY, C.B.**—The prisoner's counsel has done his duty, and we must now do ours. This conviction must be affirmed.

*Conviction affirmed.*

#### REG. V. HENRY JENKINS.

##### *Murder—Evidence—Dying declaration.*

Upon a trial for murder, a declaration of the deceased taken by a magistrate's clerk, tendered as evidence for the prosecution, contained the following:—"From the shortness of my breath I feel that I am likely to die, and I have made the above statement with the fear of death before me, and with no hope at present of my recovery." The words "at present" were interlined, and the clerk having been recalled to explain the interlineation, said that after he had taken the deposition he read it over to the declarant and asked her to correct any mistake that he might have made, and that she suggested the words "at present;" that she said "no hope at present of my recovery," and he then made the interlineation.

*Held*, that the words suggested by the declarant qualified the statement as it stood previous to the alteration, and showed that she was not absolutely without hope of recovery, and, therefore, that the declaration was inadmissible.

C. C. R. 17 W. R. 621.

##### Case reserved by Byles, J. :—

The prisoner, Henry Jenkins, was convicted at the last Bristol assizes of the murder of Fanny Reeves, and is now lying under sentence of death, subject to the decision of the Court of Criminal Appeal as to the admissibility of the dying declaration of the deceased woman.

It appeared in evidence that on the night of the 16th October, between eight and nine o'clock, the screams of a woman were heard in the river Avon, at a place where the river is deep. It was about high tide. Assistance was procured, and the deceased was rescued from the water, but in an exhausted condition. She continued very ill, and became, according to the medical evidence, in great danger. On the next day, the 17th, she said she did not think she should ever get over it, and desired that some one should be sent for to pray with her. A neighbour of the name of Axell accordingly visited her about eight o'clock p.m., who prayed with her, and, as her mother said, talked seriously to her.

At ten o'clock the same evening the magistrate's clerk came. He found her in bed, breathing with considerable difficulty and moaning occasionally. He administered an oath, and she made her statement, as hereinafter set forth. He asked her if she felt she was in a dangerous state—whether she felt she was likely to die. She said, I think so. He said, why? She replied, from the shortness of my breath. Her breath was extremely short; the answers were disjointed from its shortness; some intervals elapsed between her answers. The magistrate's clerk said, "Is it with the fear of death before you that you make these statements?" and added, "Have you any present hope of your recovery?" She said, none.

The counsel for the defendant pointed out that in the statement the words "at present" are interlined.

The magistrate's clerk was recalled. He said that after he had taken the deposition he read it

over to her, and asked her to correct any mistake that he might have made. She then suggested the words "at present." She said—no hope "at present" of my recovery. He then interlined the words "at present." She died about eleven o'clock the next morning.

Without the declaration of the deceased there was no evidence sufficient to convict or even to leave to the jury, but the evidence for the prosecution was, so far as it went, confirmatory of the deceased woman's statement.

The case therefore rested on what was called the dying declaration of the deceased.

The counsel for the defendant, Mr. Collins, submitted that upon the evidence there was not such an impression of impending death on the mind of deceased as to render the declaration admissible.

I expressed no opinion, but thought it the safest course to reserve this question for the opinion of this Court, and to let the case go to the jury.

The examination of Fanny Reeves, taken on oath the 17th of October, 1868:—

The deponent saith—I am a single woman and have two children, the one aged four years and the other aged about five months. The father of the first child, which is a boy, is Henry Jenkins. He lives in Ship-lane, Cathay, and is a ship carpenter. He has been paying me, under order of magistrates, 2s. per week for the support of that child, but he has not kept up the payments, and he now owes me £1 7s. Last night, the 16th inst., about half-past six o'clock, I met him by appointment on the New Cut, in the parish of Bedminster, in this city, and I asked him if he was going to give me some money to buy a pair of boots for myself. He said that he hadn't any money. I told him that I must sue him for my money, and then he asked me to walk with him to the Hot Wells, and said that he would get some there. I accompanied him to the Hot Wells, and he went into a house at Cumberland-terrace; I waited for him outside, and he came out in a short time, and said that he could not get any money, and he asked me then to walk with him up Cumberland-road, and we went along that road together, until we got near Bedminster-bridge, and we stood on the New Cut, near his residence, and we had a few angry words together about the money he owed me, and he told me that I could have a warrant for him if I liked. After we had stood there about ten minutes, he said, "here's a rat climbing up the bank," and he advanced to the edge of the bank, and I went too, and looked, but could not see any rat, and directly I got on the edge of the bank, he pushed me with both hands on the back, and at the same time said, "take that you bugger," and he pushed me direct into the river Avon, which runs along there; I screamed out and managed by catching hold of the bank to keep myself up until I was taken out of the water, and I believe it was by a policeman. After being so taken out, I became insensible, and did not recover till I found myself in bed in this house. Since then I have felt great pain in my chest, bosom, and back. From the shortness of my breath I feel that I am likely to die, and I have made the above statement with the fear of death before me, and with no hope at present of my recovery. Dr. Smart has been to see me

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twice to-day. It was about eight o'clock on the said evening when the said Henry Jenkins pushed me into the water. He was under the influence of liquor at the time—but was not tipsy: I had two drops of rum with him during our walk; I know of no motive for his so pushing me into the water, except it was that I had asked him for money.

The mark X of Fanny Reeves.

The jury found the prisoner guilty.

Sentence of death was passed, but execution stayed, that the opinion of this Court might be taken on the admissibility of the declaration.

J. BARNARD BYLES.

*Collins* (Norris with him), for the prisoner.—This declaration was inadmissible. The general principles on which this anomalous species of evidence is admitted are laid down in *R. v. Woodcock*, 1 Leach, 500, 3 Russ. on Crimes, 4th ed. 250. The preliminary facts to be proved before it can be received are that the deceased at the time of making her declaration was under a sense of impending death and an impression of immediate dissolution; but it is not essential that death should, in fact, take place immediately. There must be no hope of recovery: *R. v. Van Butchell*, 3 C. & P. 629, 3 Russ. 258; *R. v. Crockett*, 4 C. & P. 544, 3 Russ. 252; *R. v. Dalmaz*, 1 Cox C. C. 96; *R. v. Spilsbury*, 7 C. & P. 187, 3 Russ. 254. "It must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant," per Willes, J., in *E. v. Peel*, 2 F. & F. 22; *R. v. Hayward*, 6 C. & P. 160, 3 Russ. 258; *R. v. Nicolas*, 6 Cox C. C. 120; *R. v. Megson*, 9 C. & P. 418, 3 Russ. 256. In this case it appears that on the day following that on which the deceased was rescued from the Avon she said she did not think she should ever get over it, and desired that some one should be sent for to pray with her, and on the same evening the magistrate's clerk took her deposition. It appears that he had asked her if she had any present hope of recovery, to which she replied—None; and, having reduced her statements to writing, he read them over to her, asking her to correct any mistake he might have made, and that she then suggested the words interlined "at present." She said—No hope at present of my recovery. It is submitted, therefore, that she treated what he had at first written as a mistake, and qualified that. Some meaning must be given to the words "at present," and it is submitted that what the deceased intended was that she had no hope then, but thought that a time might come when she might have hope; and, if so, there was not such a settled hopeless expectation of death as is essential to the reception of such evidence.

*Sanders* (Bailey with him), for the prosecution, admitted the authority of the cases cited, but contended that this came within them. If there is a belief on the part of the deceased that she will die, though she does not feel it to be impossible that she may recover, it is sufficient. The question is, What is the belief? and not, What the possibility?—for it may almost in every case be said, whilst there is life there is hope. *R. v. Brooks*, 3 Russ. 264. [KELLY, C.B.—She treats what the clerk first wrote as a mistake, not as a mere omission.] [LUSH, J.—The added words do not strengthen what she had previously

said; but do they not weaken it?] [BYLES, J. Do they not mean—I have no present hope; but I think I may have hope by and bye?] [LUSH, J.—It must be clear that the deceased has no hope, and must not be left doubtful.]

*Collins*.—The law looks with jealousy on this kind of evidence (*Greenleaf on Evidence*, 283), and any hope, however slight, renders it inadmissible. Here the deceased declined to say all hope was gone.

The learned judges constituting the Court (KELLY, C.B., BYLES, LUSH, and BRETT, JJ., and CLEASBY, B.) having retired, on their return

KELLY, C.B., delivered judgment as follows:—We are all of opinion that this conviction must be quashed. The question for us, and the only question, is whether the declaration of the deceased was admissible; and it is clear that if that is excluded, there was no evidence to go to the jury. The question depends entirely upon what passed between the magistrate's clerk and the dying woman. It appears that he found her breathing with difficulty, and moaning, and, having administered an oath, that he asked her if she felt she was in a dangerous state and likely to die. She said, "I think so." So far it shows she was under an impression merely that she was likely to die, and there is nothing in that part of the statement to render it admissible; but he goes on to ask her why? and she replies from the shortness of her breath. Her answers were disjointed from its shortness. He then asks her, "Is it with the fear of death before you that you make these statements; have you any present hope of your recovery?" She said none, and thereupon he reduced to writing what she had said in these terms: "From the shortness of my breath I feel that I am likely to die, and I have made the above statement with the fear of death before me, and with no hope of my recovery." If the dying woman had subscribed that declaration it is sufficient for us to say that the case for our consideration would have been a very different one from the present. But it appears that after the prisoner's counsel had pointed out to the judge at the trial the interlineation of the words "at present" in the statement as it then stood, the magistrate's clerk was recalled, and said that after he had taken the deposition he read it over to her and asked her to correct any mistake that he might have made, and that she then suggested the words "at present," and said, "No hope at present of my recovery," and he interlined the words "at present." The question is, whether this declaration is admissible. I am of opinion that the decisions show that there must be an unqualified belief of impending death, without hope of recovery. Looking at the decisions, the language of Eyre, C.B., is, "When every hope in this world is gone;" of Willes, J., "There must be a settled hopeless expectation of death in the declarant." To make this kind of evidence admissible the burden of proof lies on the prosecution, and we must be perfectly satisfied beyond doubt that the deceased was at the time under an unqualified expectation of impending death. Here the declarant herself suggests the interlined words, "at present." The counsel for the prosecution would have us give no effect whatever to them; but they must have had some meaning. She may have meant by

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them—I desire to alter and qualify my previous statement; I mean to say, not that I have absolutely no hope of recovery, but that I have no present hope of recovery. If the words admit of two constructions, one in favor and one against the prisoner, we should adopt that one which would be *in favorem vitæ*. But the interlineation and alteration here was caused by the magistrate's clerk asking the declarant to correct any mistake, and, the case being one of life and death, she in effect says—There is a mistake, and I desire it to be corrected. The words, therefore, have a definite and fixed meaning, namely, to qualify the statement read to her.

BYLES, J., said that, having tried the case, he wished to state that from the first he entertained a strong doubt upon the question, but as there was no other evidence to leave to the jury he had thought it best to reserve the case. The law properly regarded the admissibility of this kind of evidence with jealousy. There was no power of cross-examining the declarant—no means of indicting for perjury; great danger of mistakes. What the declarant said in effect was, "If I don't get better, I shall die."

*Conviction quashed.*

## UNITED STATES REPORTS.

### SUPREME COURT OF ILLINOIS.

THE CHICAGO & GREAT EASTERN RAILWAY COMPANY, ET AL. V. MARSHALL.

#### *Dying declarations.*

In no case, save that of a public prosecution for a felonious homicide, can the dying declarations of the party killed be received in evidence. In civil cases they are not admissible.

BREWER, C.J.—The only question of any real importance presented by this record, which we are disposed to discuss, is, were the dying declarations of the boy admissible in evidence to charge the defendants?

The action was case to recover damages for death occasioned by the careless management of a railroad locomotive, and brought by the father of the boy killed, as his next of kin and personal representative.

This is a new question in this court, and quite an interesting one, which we lack time to discuss at very great length. A few principles of evidence will be noticed, and such opinions as text writers on evidence or courts of justice may have declared on the point.

The general rule is, that *hearsay* evidence, that is, statements coming from one not a party in interest, and not a party to the proceeding, and not made under oath, are not admissible, for the reason that such statements are not subjected to the ordinary tests required by law for ascertaining their truth; the author of the statement not being exposed to cross-examination in the presence of a court of justice, and not speaking under the penal sanctions of an oath, with no opportunity to investigate his character and motives, and his deportment not subject to observation; and the misconstructions to which such evidence is exposed, from the ignorance or inattention of the hearers, or from criminal motives, are powerful objections.

There are, however, well established exceptions to this rule, whether wisely so or not, is certainly a grave question, and among them are dying declarations. These are understood to be statements made by a person under the immediate apprehensions of death, and who did die soon after. In 1 Phil. Ev., 215, it is said, the declarations of a person who has received a mortal injury, made under the apprehension of death, are constantly admitted in criminal prosecutions, and are not liable to the common objection against hearsay evidence, partly for the reason that the awful situation of the dying person is considered to be as powerful over his conscience as the obligation of an oath, and partly on a supposed want of interest, on the verge of the next world, dispensing with the necessity of a cross-examination. Without questioning the soundness of this last reason, obnoxious as it may be to fair criticism, it may be safely said, the exception itself deprives an accused party of a most inestimable privilege secured to him by the ninth section of Article 18 of our State Constitution, "to meet the witnesses face to face," so that by cross-examination the truth may be eliminated.

The exception is in derogation of common right, for, independent of constitutions and laws, an accused person has the right to hear the witness, who is to condemn him, in his presence, so that he may be subjected to the most rigid inquiry. To hang a man, on the statements of one who is on his dying bed, racked with pain, incapable in most cases of giving a full and accurate account of the transaction, weakened in body and in mind; and, though in *articulo mortis*, harboring some vindictive feeling against him who has brought him to that condition, is, to say the least, and has always been, a dangerous innovation upon settled principles of evidence; and no court ought to be disposed to extend it, to enhance cases to which it did not, in its inception apply. The rule itself has no great antiquity to recommend it, it having been first declared, by Lord Chief Baron Eyre, at the Old Bailey, in 1787, in *Woodcock's case*, 1 Leach, Crown Law 500, in which the monstrous doctrine was held, that although the *declarant* did not apprehend she was in a critical state, in momentary expectation of death, soon to appear before the throne of the Eternal—and, although the witnesses could give no satisfactory information as to the sentiments of her mind upon that subject, and the surgeon testifying that she did not seem to be at all sensible of the danger of her situation, and never saying whether she thought she should live or die; the court held, on its own conviction; that she was in a condition rendering almost immediate death inevitable; and, as persons about her thought she was dying, her declarations, made under such circumstances, ought to be considered by the jury as being made under the impression of her approaching dissolution, when the case showed, by the most positive proof, she had no impressions upon the subject.

Having no such impression, how could her conscience have been touched?

The prisoner was convicted and executed, thus adding one more to the judicial murders which blacken the page of history.

And this is the leading case in support of the exception.

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To tolerate this exceptional rule, the declarant ought to be, at the time of making the declarations, under the impression of almost immediate dissolution, and without any hope of recovery.

When that has departed—when he is conscious he is, in a moment, to be among the dead, and his soul to take its flight from the body, thus circumstanced, it might be said, his declarations, understandingly made, were of equal force with his testimony delivered in a court of justice; and entitled to be received, and justly, were it not for the fact, the accused was not present, and had no opportunity to cross-examine him.

The bed of death affords no opportunity for this; and the accused may become the victim of statements, which, by reason of the fading condition of the body, in which the mind must in some degree participate, of him who makes them, depriving them of that clearness, distinctness and correctness which should characterize them, and, destitute of which, human life should not be sacrificed by them.

In looking into the books, we find that such declarations are restricted to cases of homicide, not those resulting from accident or mischance, but felonious homicide.

The cases, in England, in which they were received, and not in cases of felony, were the case cited by appellee, in 8 Burrows 1244, *Wright, lessor of Clymer, v. Little*. The declarations admitted in that case were the confessions of the forger himself, made on his death-bed, and Lord Mansfield said he should admit them as evidence, but that no general rule could be drawn from it.

The same was the case of *Aviston v. Lord Kinnaird*, 6 East, 195. These two cases, the learned author (Phillips on Evidence) thinks, were overruled by the case of *Stobart v. Dryden*, 1 Meeson, and Welsby 615, and one not supported by the deliberate judgment of any court; but that the disposition of courts was rather to restrict the admissibility of dying declarations, even in criminal cases.

The true foundation of the rule, that they were admissible in cases of felonious homicide, was policy and necessity, since that crime is usually committed in secret; and it cannot be allowed to such an offender to commit the crime, and, by the same act, still forever the tongue of the only person in the world which could speak his crime.

That they are not admitted in civil cases, is held by most courts in this country and in England.

The only case to the contrary, is the one referred to by appellee, as decided in N. Carolina, *Falcon v. Shaw*, 2 N. Car. Law R. 102.

This was a case for seduction, brought by the father, and he was permitted to give in evidence the dying declarations of his daughter, that the defendant was her seducer.

The leading case in this country against this admissibility, in civil cases, is *Wilson v. Bowen*, 15 Johns. 286, opinion of the court by Thomson, Ch. J., referring to the case of *Jackson v. Kniffen*, 2 Ib. 85, opinion of Livingston, J. The same rule was held in *Gray v. Goodrich*, 7 Ib. 95, which appellee has cited, were it is said the law require the sanction of an oath to all parol testimony.

It never gives credit to the bare assertion of any one however high his rank or pure his morals.

The cases of pedigree, prescription or custom, are exceptions to this rule. What a deceased person has been heard to say, except upon oath, or in extremis when he came to a violent end, never has been considered as competent evidence.

This clearly, has no reference to a civil case but to a criminal prosecution for a felonious homicide. See also *Kent v. Walton*, 7 Wend. 256.

We think it may be safely said, that the rule at present prevailing in this country and in England on this subject is, that in no case, save that of a public prosecution for a felonious homicide, can dying declarations of the party killed be received in evidence, and to this extent, and no further are we inclined to go.

In civil cases they are not admissible. To admit the dying declarations in this case was error, and for that error the judgment must be reversed and the cause remanded.

## SUPERIOR COURT OF CINCINNATI.

### BAILEY V. BERRY ET AL.

#### Joint Trespassers.

Joint trespassers may be sued together, or any of them separately, and the non-joinder of the others is no defence.

A release to one of several joint trespassers will discharge all, but it must be a technical release, not merely a covenant not to sue, or other instrument amounting to a release by implication merely.

Where plaintiff sued joint trespassers and then made an agreement with a portion of them to withdraw the suit as to them for a certain sum of money, and in pursuance of this agreement made an entry on the record that he was unwilling further to prosecute his action against the parties named, and as to them the action was dismissed; Held, that the others were not discharged, but they were entitled to have the jury instructed, in making up their verdict, to deduct the amount received already by plaintiff from the amount of damages sustained by him.

This was a case reserved from special term upon the pleadings and the evidence contained in the bill of exceptions.

In February, 1860, the plaintiff filed his petition against J. Q. A. Foster and fifteen other persons, for an alleged trespass upon his property, in Campbell county, Ky., and in March, in the same year, by leave, filed his amended petition, claiming damages for the injury described in the former pleading.

Five of the defendants—B. Taylor, Hallam, Piner, Root and Winston, filed demurrers to the petition, which, after argument, were overruled. On the 16th of June, 1862, Charles Air answered with a general denial of the allegations of the petition.

While the action was pending, an entry was made upon the minutes by the plaintiff, that he would not further prosecute his claim against four of the defendants, James Taylor, Jr., Barry Taylor, John Taylor, and James R. Hallam, as to whom the action was dismissed.

Subsequent to this Berry, Winston, Root and Air filed answers, to portions of which the plaintiff demurred, and his demurrer was afterwards overruled. In March, 1866, the plaintiff, by leave, filed an amended petition, in which he set forth that in October, 1859, at Newport, Ky., he was the owner and in possession of several printing presses, and diverse articles attached to his printing establishment, including a large quantity of type, of the value of ten thousand dollars,

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BAILEY V. BERRY ET AL.

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which the defendants had unlawfully taken and converted to their own use, for which sum he asked judgment.

To this last amended petition, the defendants Winston, Berry, Air and Root severally answered, denying the matters alleged against them generally, and setting up as a bar to the action against them, "that since its commencement the plaintiff had, in consideration of \$1,600, paid to him by J. R. Hallam, Barry Taylor and James Taylor, Jr., who were originally their co-defendants in the action, settle, released and discharged said defendants, from whom said sum was received, from any and all liability for the wrong and injury committed by them, and as they were all joint trespassers, the release of those parties discharged all the wrongdoers." To this last allegation in their answer the plaintiff replies by a denial of the whole statement.

On these pleadings the case was tried before a jury. The evidence, which is fully contained in the bill of exceptions, was submitted to the jury, and a verdict rendered in favor of the plaintiff for \$2,556 against all the defendants remaining on the record.

To establish the fact of the release alleged in the answer, written and oral testimony was heard, which was uncontradicted, but the effect of which the judge who tried the cause held to be a legal question only, and directed that a verdict should be rendered upon the whole evidence offered to establish the plaintiff's right to recover, as well as that of the defendants to oppose it, subject, however, to the opinion of the court on the law arising upon the alleged release.

The defendants afterwards severally moved for a new trial.

*Stallo & Kittredge* for plaintiff.

*Jordans & Jackson* for defendants.

STONE, J.—The important question for us to consider, as the counsel upon both sides admit, is, what was the effect of the entry by which four of the defendants were dismissed from the action; does it apply only to those named, or does it extend to all the defendants?

The entry is, in substance, this:

"The plaintiff comes and makes to the court known that he is unwilling further to prosecute this action against the parties described, and thereupon they are adjudged to go hence without day, and as to them the action is dismissed, at their proportion of the costs then accrued."

It cannot be claimed that this dismissal, which is equivalent only to a judgment of *not pros.* at the common law, can operate either for or against the other defendants. No such effect would be produced even in a criminal case. This was held in *Rev. v. Sergeant* (12 Mod. 320), and is now the settled law.

We find in the early case of *Parker v. Lawrence*, decided in the reign of James I., Hobart 70, that the court were of opinion that a *not pros.* as to one or more joint trespassers, before action, would discharge the action. But in the next reign the case just quoted was overruled, and the court held that a discontinuance as to one defendant was a mere agreement to relinquish the action as to him only, and he alone could take advantage of it, the plaintiff being still at liberty to proceed against the other defendants: *Walsh v. Bishop* (Cro. Car. 243).

Since this decision the current of the law has been uniform on the point. We find it settled in *Noké v. Ingham* (1 Wilson 90;); *Dale v. Eyrre* (Id. 306;); *Cooper v. Tiffin* (8 T. B. 511;); *Mitchell v. Milbank* (6 T. B. 200).

The cases are carefully collected and approved by Sergeant Williams in his note to *Salmon v. Smith* (1 Saunders 206, note 2), and establish fully the rule we have indicated, that a *not pros.* dismissal or discontinuance as to one defendant, before judgment, does not enure to the benefit of the others. And thus it is when an infant or a married woman are jointly sued with another, a plaintiff may enter a *not pros.* as to the minor or the *feme covert*, without affecting the liability of the other party to the suit: *Pell v. Pell* (20 Johns. 126;); *Woodward v. Newhall* (1 Pickering 500).

The principle which governs all these decisions implies that the party injured by co-trespassers, or who is the creditor of co-debtors, may sue either one of the individuals against whom the action may be brought; he is not bound to prosecute all, and although a plea in abatement is permitted in case of the non-joinder of debtors, the privilege does not extend to tort-feasors; all are regarded as principals, and neither the omission to sue all, nor, if all are sued, the dismissal of one of them from the suit, can be pleaded by the other parties in bar.

From a very early period it has been held that the absolute release of one joint trespasser from his liability, discharges all who may have participated in the act; such is the language in Co. Litt. section 376, and contemporaneous cases of *Cocks v. Jenner* (Hob. 68), and *Hitchcock v. Thornland* (8 Leonard 122). All united to produce the injury, there was a common purpose to be accomplished by the result, and there could be no severance of the liability. Hence, if there was a remission of his liability to one, it became the privilege of all. These decisions have since been followed by the English and American courts, wherever the state of facts warranted their application, and we need not refer to the numerous adjudications which have sustained the principle. In *Ellis v. Bitzer* (2 Ohio 89) it is fully admitted.

But the release pleaded, as a discharge for all, that has been given to one only, must be a technical release, under seal, expressly stating the cause of action to be discharged, with all condition or exceptions: *Fitch v. Sutton*, 5 East 232; *Rowley v. Stoddard*, 7 Johns. 207; *Dezeng v. Bailly*, 9 Wend. 836; *Shaw v. Pratt*, 22 Pick. 805; *Mason v. Jouett's Admr.*, 2 Dana 107; *Miller v. Fenton*, 11 Paige 18; *Hoffman v. Dunlap*, 1 Barb. 185; *Crawford v. Millapaugh*, 18 Johns. 87; *Seymour v. Minturn*, 17 Id. 169; *Couch v. Mills*, 21 Wend. 425; *Jackson v. Stackhouse*, 1 Cowen 122.

So strictly are these technicalities adhered to, that no release is allowed by implication; it must be the immediate legal result of the terms of the instrument which contains the stipulation; hence it is that a covenant not to sue, or to assert a claim, or in any manner to hold liable one joint debtor or trespasser, though it operates between the immediate parties, does not extend to the others.

Thus, in the early case of *Hitchcock v. Thornland*, already referred to, where it was admitted a release to one would discharge all, the distinction we have stated was recognized by ATKINSON, J.; and in *Lacy v. Kynaston* (1 Lord Raym. 689), reported also in 12 Mod. 548, where the question came directly before the judges, it was held that a covenant not to sue was personal to the covenantee only, and could not be set up by other parties. In those cases it was well observed, that such a covenant operated as a release between the parties themselves, to avoid circuity of action, but could not extend further, "as if A. and B. be jointly and severally bound to C. in a sum certain, and C. covenants with B. not to sue him. That shall not be a release but a covenant only, because he covenants only not to sue B., but does not covenant not to sue A., against whom he still has his remedy."

Late in the last century the case of *Dean v. Newhall*, 8 T. R. 168, was determined by Lord KENYON, where the defendant pleaded that his principal, with whom he was jointly bound, having been, as he claimed, released by an agreement under seal, which obligated the plaintiff not to sue him, and if he did, the agreement thus made "should be a sufficient release and discharge to all intents and purposes, both at law and in equity, to and for the debtor, his executors, &c." It was argued that this agreement was a release of the right of action against principal and surety, but in reply the case we have cited from Raymond was referred to, and his lordship, in giving the opinion of the whole court, said: "The case of *Lacy v. Kynaston* removes all difficulty on this subject, and is a direct authority for the plaintiff. I had only been doubting in my own mind on the strict law of the case, for that the honesty and justice of it are with the plaintiff, cannot be doubted. Even if the defendant had succeeded here, a court of equity would have given the plaintiff full relief. But I am glad to find, by the case cited, that we are fully warranted in deciding for the plaintiff on legal grounds." Since the determination of this case, there is not, we believe, a single reported decision opposed to the principle it affirms, to be found in the English Courts, and we might quote cases *ad libitum* to the same point, if there could be a doubt of the correctness of our statement: *Farrell v. Forest*, 2 Saund. 48, note 1.

In the American courts the same rule is adhered to without exception: *McLellan v. Cumberland Bank*, 24 Maine 566; *McAllister v. Sprague*, 84 Id. 296; *Walker v. McCullough*, 4 Greenl. 421; *Tuckerman v. Newhall*, 17 Mass. 581; *Shaw v. Pratt*, 22 Pick. 805; *Smith v. Bartholemew*, 1 Metc. 276; *Brown v. Marsh*, 7 Vt. 827; *Durrell v. Wendell*, 8 N. H. 869; *Snow v. Chandler*, 10 Id. 92; *Crane's Admr. v. Ailing*, 8 Green N. J. 423; *Catakill Bank v. Messenger*, 9 Cowen 88; *Rowley v. Stoddard*, 7 Johns. 207; *Couch v. Mills*, 21 Wend. 424; *Bronson v. Fitzhugh*, 1 Hill 185; *Frink v. Green*, 5 Barb. 455.

The courts, in the examination of the numerous decided cases, have been required to give a construction to every conceivable stipulation inserted in the agreements which have been pleaded as releases of liability, and have invariably pursued the same course in yielding nothing to

mere implication, wherever words of release are found in the instrument.

The intention of the parties is alone regarded, holding the established legal maxim, that where a particular purpose is to be accomplished, and language which expresses it is clear and certain, no general words subsequently used in the same agreement shall extend the meaning of the parties: *Thorpe v. Thorpe*, 1 Lord Raym. 235.

DALLAS, C. J., in *Solly v. Forbes*, 2 Brod. & Bing. 46, having examined the leading cases, observes, as courts look at the intention of the parties, in modern times more than formerly, rather than the strict letter, not suffering the latter to defeat the former, held that general words of release even could not be operative to enlarge a previous statement which defined the particular object for which the agreement was made. The same principle is found in *Turpeny v. Young*, 5 Dowl. & Ry. 262, and is referred to and affirmed in *Thompson v. Lach*, 3 M., G. & Scott 551. See also *North v. Wakefield*, 18 Ad. & B. 540.

On similar grounds it was held in *McAllister v. Sprague*, 84 Maine 297, where a receipt had been given by a creditor to one of his joint debtors, which recited that the debtor had paid a certain sum in full of his half of the debt, due jointly by him and another, and which was to be his discharge in full for debt and costs, but no discharge of the co-debtor. It was decided that this could not be pleaded as a release by the other judgment debtor, the intention of the parties being that his liability should still remain. See also *Durrell v. Wendell*, 8 N. H. 869.

Having thus ascertained what is now the established rule in deciding the question raised by the defendant, let us now examine the facts as they are found proved in the bill of exceptions, and to which there is no contradiction.

Before we proceed, however, it is proper to consider how far the entry on record, by which the defendants Taylor and Hallam were dismissed from the suit, can be explained or enlarged by parol evidence. The purpose is plainly stated, and as to the parties named therein, it was a legal discharge from the pending proceedings, but how far it was a bar to a subsequent action, is not now a question, as counsel admit it would be barred by the statute. As the only written evidence of an arrangement between the plaintiff and these parties, is the record made at the time, and without which it would be difficult to say how these parties could avail themselves of the alleged benefit they had secured, it would seem to be inconsistent with the established rule of evidence to permit any explanation where there is neither ambiguity in the terms used, or the purpose intended to be accomplished.

But to give the testimony its weight, the result of a careful analysis of the whole is this:

During the pendency of this suit, the counsel of both parties met the father (Col. Taylor) of two of the then defendants, and with James R. Hallam, another, the plaintiff also being present, when it was agreed that \$1,500 should be paid, and these defendants dismissed or released from the action, reserving to the plaintiff his right to proceed against the other defendants. The money was paid by Col. Taylor, and the entry referred to made accordingly.



If then, we apply the doctrine already stated, where written instruments pleaded as releases, have been construed by the courts, we cannot perceive that the arrangements made by the plaintiff with the defendants, is without the rule.

To give it all the weight to which it is justly entitled, it must be determined upon the same principles which control every similar case, however formal may be the evidence to establish the facts.

The result of our investigation has led us all to conclude that neither the entry on the record dismissing three of the defendants from the action, or the arrangement with the parties, which preceded that entry, and on which the agreement to dismiss was founded, can be regarded as a discharge in law of the defendants who still remain on the record.

1st. Because they are not technical releases in writing sealed by the proper party.

2nd. That if they could be construed as implying an agreement not to sue, they can avail only to the defendants with whom they were made, and cannot operate for the benefit of the defendants who set up the facts in discharge of the plaintiff's action against them.

3rd. That the entry referred to dismisses the defendants only from the action, without reference to their co-defendants. It was the privilege of the plaintiff to have entered a *nol. pros.* or discontinuance as to any one or more of the defendants, and the dismissal in the case before us but produces the same result.

The plaintiff might have sued either of the defendants, or all, and as it would be no ground of defence that other parties were not joined, it must follow, the remaining defendants in the suit have no cause of complaint.

4th. That the intention of the parties, as expressed when the arrangement was made and proved by the witnesses, must be taken to qualify the agreement, and thus establish its true character, and we believe it was merely to decline to prosecute further the defendants who were dismissed, and nothing more.

Neither do the facts we have alluded to prove an accord and satisfaction, as it must be admitted, if they did, it would have the same effect as a technical release, nor do they contain the ordinary elements of what the law regards as necessary to constitute such a bar.

We have been specially referred to the case of *Ellis v. Bitzer*, already quoted, to change or modify the rule we have stated, but it does not, we think, conflict with the leading principle which we suppose governs all similar cases. The courts do not there assume any new rule of interpretation, or attempt to extend the operation of that which has hitherto been received, and acted on in the trial of causes, and we find nothing inconsistent, therefore, with the conclusion to which we have arrived.

Nor do we doubt, although there may be found individual judgments against joint trespassers, the plaintiff can have but have but one satisfaction; he must elect which of the judgments he will enforce, on the same principle, were there may be different findings by the same verdict when all the trespassers are sued, the successful party must choose "*de melioribus damnis*"—he cannot claim to collect all. It follows, then, if

the damages are satisfied in part, by payment or compromise with some of the defendants, the plaintiff may still proceed against those who remain on the record, and we hold it was the duty of the judge who tried the cause at special term, to have instructed the jury as he did, to deduct in their finding whatever sum the plaintiff has already received on account of his alleged injuries, from the parties who were afterwards dismissed.

This was the just application of the rule that there cannot be a double remuneration for the same wrong.

This is very distinctly stated by Upham, J., in *Snow v. Chandler*, 10 N. H. 95. It is, he says, that "the sum paid was not received in satisfaction of the damages, but only in part satisfaction, and the fact that it was coupled with an engagement not to sue, does not alter the case. But to the extent of the amount paid, the defendant may avail himself of the arrangement." See also *Merchants' Bank v. Curtis*, 37 Barb. 320.

We have thus traced the principle, familiar as it is, that determines this case to its source, and followed down the course of decisions to the present time, not that there was any novelty in the rule, but that we might satisfactorily determine what in reality was a legal bar to this action, and although the examination of the numerous cases, both ancient and modern, has convinced us that the old maxim "*Melius est petere fontes, quam sectari rivulos*," has not always been regarded by the courts, we find no difficulty in arriving at the result we have reached. Not only upon the law as we hold it to be, but on the facts proved, we are all of opinion that the motion for a new trial should be overruled, and judgment entered on the verdict.—*Am. Law Register*.

## GENERAL CORRESPONDENCE.

### *Mortgages by Married Women—Power of Sale.*

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Suppose a married woman owns real estate, and with her husband duly mortgages the same; suppose further, that among the covenants and clauses in said mortgage there is the usual power of sale clause. In the event of default being made in payment, can such mortgaged premises be sold under such power of sale?

Does not cap. 85, Con. Stat. U. C., merely enable a married woman, upon certain formalities being observed to convey her lands? But does the act also enable her to give to her mortgagee, the power, upon nonpayment of the mortgage, to convey her lands for the purpose of paying his claims &c., on such real estate? See *Graham v. Jackson*, 6 Q.B., 811 and 2nd edition of Darts Vend. & Pur., 297 & 298.

I have lately noticed in investigating titles, that several sales under the sanction and advice

## GENERAL CORRESPONDENCE.

of professional gentlemen have been made under the circumstances above mentioned, but I have some doubt as to such a title. I think that such married woman, at least after her husband's death, has a right to redeem notwithstanding such sale.

Your opinion on the above will much oblige,  
Yours Truly,                      LEX.

[We cannot undertake to answer questions of this nature. We shall be happy however to publish any letters discussing the point.—Eds. L. J.]

*Will's Act 1868-9.*

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I notice in the Act to amend the Law as to Wills, in the Statutes of Ontario 1868-9 what appears to be a misprint. The 3rd section provides, that "Every will shall be revoked by the marriage of testator, *except* a will made in exercise of a power of appointment when the real or personal estate thereby appointed *would* in default of such appointment, pass to the testator's heir, executor or administrator or the person entitled as the testator's next of kin under the Statute of distributions." Now, the English Stat. 7 Will. IV and 1 Vict. c. 26, s. 18, from which this Act is taken excepts appointments not which *would*, but which "*would not* pass to the testator's heir &c., and this seems to be more reasonable. Is there not an error in our Statute?

Yours truly,  
G. C. G.

St. Catharines, June 12th, 1869.

[Will be referred to hereafter.—Eds. L. J.]

*Signing final Judgment and issuing execution in two days—A law trick.*

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—A curious *law trick*, for I can call it nothing else came lately under my observance, to which it may be worth calling the attention of the legal profession. Indeed it is a curiosity in its way. It has been for many years understood to be the policy of the law in Canada, to prevent as far as possible, an embarrassed debtor from preferring one creditor to another—in other words, the law favors an equal, just distribution of a debtor's property. Hence a confession of judgment in favor of, or a sale or assignment of all

a debtor's property when he is in insolvent circumstances to a favored creditor, is legally bad. By the ordinary process of the law, as marked out in the Common Law Procedure Act, a creditor has to wait a certain time—to take certain steps before he can get a judgment and issue execution on a specially endorsed writ. Thus—he issues a Summons—serves it—and the debtor has ten days within which to appear after service. If the debtor fails to appear on the tenth day, the creditor can sign judgment on the eleventh day. Then the creditor waits eight days more, in all eighteen days, before he can issue execution. But it seems a few lawyers in Toronto (one at least to my knowledge), has found out a way to set at defiance the law as to confessions of judgment—the law as to preferences, and to laugh to scorn the slow process of the Common Law Procedure Act. What, wait eighteen days? nonsense—it can all be done in two. Thus "A" has a claim against "B"—he issues and serves a specially endorsed writ on "B" through some convenient attorney (or if you will by himself), all in one day—"B" by another convenient attorney appears the second day as a matter of form, (perhaps the name of some attorney at a distance is used, with or without his assent). The appearance is filed on the first or second day. Then "A" at once files his declaration, and "B" (accommodating man!) at once pleads, all on the second day. Suddenly "B" without assigning any reason, withdraws his pleas or enters a written disclaimer. "A" watching his opportunity (spider-like) makes up and enters a judgment by *nil dicit*, and as quick as thought pounces on "B's" goods with an execution—or garnishees his debts, and has the money in his pocket before some poor creditor has even got a judgment. Now all this is done in two days. It is done in concert by having a debtor *willing to prefer* a creditor, and by two attorneys playing into each other's hands, or acting as the machines of two men setting the objects of the law at defiance.

I happen to know that two judgments were lately signed in the Queen's Bench in this way, and signed evidently to obtain an illegal advantage over a creditor who had a judgment laying unpaid.

Now here is a trick—a legal trick—that two may play at. Is it, or is it not legal? Is it not in fact an abuse of the process of the court

## GENERAL CORRESPONDENCE—AUTUMN CIRCUITS, 1869—APPOINTMENTS TO OFFICE.

—doing what the law calls a fraud. Why should "B," who pleads, thus withdraw his pleas? or why should "A," who ought to wait eight days after a declaration served—sign judgment the same day he filed his declaration?

Why should these two men, *through two* lawyers, do an act, which is in fact no less than a confession of judgment by an insolvent debtor?

For my part I very much question the legality of the judgment, yet I am told by the Crown officers, such a thing can be legally done.

C. M. D.

Toronto, June 8th, 1869.

## AUTUMN CIRCUITS, 1869—

## EASTERN CIRCUIT.

*Hon. Mr. Justice Gwynne.*

Pembroke.....	Wednesday..	Sept. 8.
Ottawa.....	Monday.....	Sept. 18.
L'Orignal.....	Monday.....	Sept. 20.
Cornwall.....	Thursday....	Sept. 23.
Perth.....	Thursday....	Oct. 7.
Brockville.....	Monday.....	Oct. 11.
Kingston.....	Wednesday...	Oct. 20.

## MIDLAND CIRCUIT.

*Hon. Mr. Justice Morrison.*

Napanee.....	Wednesday....	Sept. 15.
Pictou.....	Wednesday....	Sept. 22.
Bellefleur.....	Monday.....	Sept. 27.
Whitby.....	Wednesday....	Oct. 6.
Cobourg.....	Monday.....	Oct. 25.
Lindsay.....	Tuesday.....	Nov. 2.
Peterborough.....	Monday.....	Nov. 8.

## NIAGARA CIRCUIT.

*Hon. the Chief Justice of Ontario.*

Milton.....	Wednesday....	Sept. 8.
Owen Sound.....	Tuesday.....	Sept. 14.
Barrie.....	Monday.....	Sept. 20.
Hamilton.....	Monday.....	Oct. 11.
Welland.....	Tuesday.....	Oct. 26.
St. Catharines.....	Monday.....	Nov. 8.

## OXFORD CIRCUIT.

*Hon. Mr. Justice Wilson.*

Cayuga.....	Wednesday....	Sept. 15.
Simcoe.....	Monday.....	Sept. 20.
Guelph.....	Monday.....	Sept. 27.
Berlin.....	Wednesday....	Oct. 6.
Stratford.....	Monday.....	Oct. 11.
Woodstock.....	Monday.....	Oct. 18.
Brantford.....	Monday.....	Nov. 1.

## WESTERN CIRCUIT.

*Hon. the Chief Justice of the Common Pleas.*

Walkerton.....	Wednesday....	Sept. 8.
Goderich.....	Monday.....	Sept. 13.
Sarnia.....	Wednesday....	Sept. 22.
Sandwich.....	Monday.....	Sept. 27.
St. Thomas.....	Tuesday.....	Oct. 5.

Chatham.....	Monday.....	Oct. 18.
London.....	Monday.....	Oct. 25.

## HOME CIRCUIT.

*Hon. Mr. Justice Galt.*

Brampton.....	Monday.....	Sept. 27.
City of Toronto.....	Tuesday.....	Oct. 5.

## APPOINTMENTS TO OFFICE.

## JUDGES.

THOMAS GALT, of Osgoode Hall, and of the City of Toronto, in the Province of Ontario, one of Her Majesty's Counsel learned in the Law, to be a Judge of the Court of Common Pleas, in the said Province, in the place of the Hon. JOHN WILSON, deceased. (Gazetted June 12, 1869.)

## COUNTY JUDGES.

JAMES JOSEPH BURROWES, of Osgoode Hall, and of the Town of Napanee, in the Province of Ontario, Esquire, Judge of the County Court of the County of Lennox and Addington, to be the Judge of the County Court of the County of Frontenac, in the said Province of Ontario, in the room and stead of WILLIAM GEORGE DRAPER, Esquire, deceased. (Gazetted June 5, 1869.)

WILLIAM HENRY WILKINSON, of Osgoode Hall, and of the Town of Napanee, in the Province of Ontario, Esquire, Barrister-at-Law, to be the Judge of the County Court of the County of Lennox and Addington, in the said Province of Ontario, in the stead of JAMES JOSEPH BURROWES, Esquire, appointed Judge of the County Court of the County of Frontenac. (Gazetted June 5, 1869.)

WILLIAM ELLIOTT, Esquire, of Osgoode Hall, Barrister-at-Law, to be Judge of the County Court of the County of Middlesex, in the Province of Ontario, in the room and stead of the Honourable JAMES EDWARD SMALL, deceased. (Gazetted June 12, 1869.)

## DEPUTY CLERK OF THE CROWN.

WILLIAM A. CAMPBELL, of the City of Toronto, Esquire, to be Acting Deputy-Clerk of the Crown, and Clerk of the County Court of the County of Oxford, in the room and stead of JAMES KINTREA, Esquire, superseded. (Gazetted June 12, 1869.)

## COUNTY ATTORNEY.

WILLIAM ALBERT REEVE, of the Town of Napanee, Esquire, Barrister-at-Law, to be County Attorney and Clerk of the Peace, in and for the County of Lennox and Addington in the room and stead of WILLIAM H. WILKINSON, Esquire, resigned. (Gazetted June 12, 1869.)

## NOTARIES PUBLIC.

THOMAS MACINTYRE, of the County of Elgin, Esquire, (Gazetted May 29, 1869.)

WILLIAM A. REEVE, of the Town of Napanee, Esquire, (Gazetted June 5, 1869.)

HAROLD RANDOLPH PARKE, of the Village of Fort Colborne, Gentleman, Attorney-at-Law. (Gazetted June 12, 1869.)

## CORONERS.

RICHARD DRAKE SWISHER, of the Village of Thamesville, Esquire, M.D., to be an Associate Coroner within and for the County of Kent. (Gazetted June 12, 1869.)

OLD BUT GOOD.—Nevada sets a good example of liberality in legal proceedings. Last winter a prominent lawyer of that state had a suit of some importance before Bob Wagstaff, justice of the peace in Scrub City, a small mining district in the upper part of the the county. After the evidence had been taken, and the lawyers had finished their talkee-talkie, the counsel for plaintiff arose and asked the justice if he would charge the jury. "Oh, no, I guess not," replied his honor; "I never charge 'em anything; they don't get much anyhow, and I let 'em have all they make!"—*Chicago Legal News.*

## A FEW WORDS ABOUT BARRISTERS.

## DIARY FOR JULY.

1. Thurs. Dominion Day. Long Vac. beg. Last day for Co. Clks. fin. to exam. Assm. Rolls, &c.
4. SUN.. 6th Sunday after Trinity.
5. MON.. Co. Ct. (ex. York) Term beg. Last day for notice of trial for Co. Ct. York. Heir and Devises sittings commence.
10. SAT.. County Court Term ends.
11. SUN.. 7th Sunday after Trinity.
12. Tues.. General Sessions and Co. Ct. sit. Co. York.
13. SUN.. 8th Sunday after Trinity.
20. Tues.. Heir and Devises Sittings end.
22. Thurs. St. Mary Magdalene.
25. SUN.. 9th Sunday after Trinity.

THE

## Canada Law Journal.

JULY, 1869.

## A FEW WORDS ABOUT BARRISTERS

## PRIVILEGE FROM ARREST.

The attendance of parties and witnesses on courts of justice has always been protected from arrest. It is absolutely necessary that their attendance should be privileged, because without such a privilege justice cannot be properly administered; but the protection of legal officers is of a different character, and may well be confined within narrower limits.

The extent of the privilege of barristers as officers of the courts is not very clearly defined. When actually engaged in the business of the court they are certainly privileged; but how far the privilege extends to all courts, or even in the superior courts, to barristers not actually engaged, but in attendance in the expectation of being engaged, it is not easy upon decided cases to determine.

There are traditions in Westminster Hall to which reference is made in 1791, in *Meekins v. Smith*, 1 H. Bl. 686. The court, according to the report of that case, seemed much inclined to think that not only witnesses, but all persons who were coming to or returning from court, either directly on the business of the court or in any manner relative to that business, were entitled to freedom from arrest, and that to arrest them was a contempt of the court. Several cases were mentioned of barristers who were arrested on the circuit and discharged by the judge. Gould, J., recollected the instance of a Mr. Hippeley, a barrister who was discharged from an arrest on the circuit by Mr. Justice Birch, at Salisbury.

Heath, J., mentioned a similar thing having been done by Mr. Baron Burland.

The privilege, to whatever extent allowed, may be traced to the recognized position and duties of the bar in Westminster Hall and on the circuits where the same bar practice under the same judges. In 1833, it is true, a barrister who had been arrested on his return from sessions, was discharged on motion by the Court of Exchequer: *Lumley v. —*, 1 C. & M. 579. But in this case the privilege was admitted at the bar without any discussion, and was afterwards distinctly repudiated in *Newton v. Constable*, 2 Q. B. 157, so that it would seem that the privilege does not now extend to barristers by reason of their attendance at courts of sessions for the purpose of obtaining practice. It is difficult to rest the distinction on any solid ground of difference. One alleged ground of difference is that attorneys may act as advocates before courts of sessions, and the privilege of attorneys in this respect is less than the privilege which has been conceded to barristers: see *Jones v. Marshall*, 2 C. B. N. S. 615.

In 1846 it was held that a barrister of the home circuit who, while at his own house in London, was arrested after the close of the assizes at one place on the circuit and before the opening of the assizes at another place on the same circuit, for which he held retainers, was privileged: *Re Sheriff of Kent*, 2 C. & K. 197. It is said that a circuit is continuous from its commencement to its termination: *Re Sheriff of Oxfordshire*, *Id.* 200. In such case it is not necessary to shew that the barrister, if in the habit of going the circuit, had, at the time of the arrest, retainers. If the barrister attend the circuit for the purpose of business, that is sufficient. It was said by Lord Tenterden in this case, that in the small counties, where the business is light, it often happens that some of the most eminent counsel of the circuit have no brief, and yet it could not be said on that account that they are not practicing barristers on the circuit.

The privilege has been held to extend to a barrister who had been attending in the Hall of the Four Courts of Dublin, and had there received a brief in a case set down for hearing on the day of his arrest, but which prior to his receiving the brief had been postponed till the next day: *Rubenstein v. —*, 10 Ir. C. L. R. 386. When a person goes to attend

## ITEMS—AN OLD CIRCUIT LEADER.

a court of justice under such circumstances as to protect him from arrest when going, the privilege would be ineffectual unless it also protected him while staying there and on his return. The two latter privileges are auxiliary to the first. The object of all three is not to benefit the party, but to protect the administration of justice: *per Coleridge, in Ex parte Cobbett*, 7 El. & B. 957.

The privilege which is extended to a barrister while in court or on the circuit, and going to and returning from the courts, must be further extended to a barrister who is also a county judge, and who is liable to be called upon to preside in a court, not only at certain stated times, but at any hour of every day, except Sunday, to act in a judicial capacity in some matter in which he alone is competent to act: *Adams v. Acland*, 7 U. C. Q. B. 211.

The Chief Justice of the Common Pleas, in giving judgment in the case of *In re Hicks*, reported in another place, after deciding that an insolvent could not legally be committed under sec. 29 of 29 Vic. cap. 18, with an opportunity of shewing cause, and that it should appear in the order of committal that the insolvent has had notice of the order for delivery, &c., referred to in the above section, for non-compliance of which an order of committal was made, remarked, that it would be well if all these orders contained a short recital of matters, so as explicitly to bring the case within the 29th section, and set out the substance of the order made on the assignee's application, together with notice to the insolvent. Thus the service of the order, or at least, averment of notice being given of it to the insolvent, and a demand of the delivery, &c., of the things ordered to be delivered, and then notice of the application to commit and opportunity of being heard against it, and then the order to commit. The statute, it may be observed, is silent as to any alternative committal.

The presumption is, that as the reports now go to each certificated practitioner, they, one and all, know their contents. But it has been said, that one man may lead a horse to the water, but fifty cannot make him drink, and so perhaps it may be that some of the law-years—not the horses—do not very deeply study the reports. If they do, they do not

profit much thereby—at least they certainly do not heed the many intimations from the courts, that irrelevant matter should not be thrust upon the judges nor charged to suitors.

The following remarks, extracted from a judgment in a late case in the Court of Appeal, are amongst the latest of the "broad hints" on this subject. One learned judge remarked:

"A very inconvenient system and practice appears to have become prevalent in respect to the making up of appeal books. In this case I have lost much time, and have been put to useless trouble, by finding printed, as part of the evidence, pages of matter which I at last found out ought not to be inserted, and could not affect the decision; and this is far from being the only ill consequence attending the practice. We cannot expect those practitioners who bring before the court a mixed heap of chaff and grain, under the name of evidence, will be particularly industrious in sifting them apart, in order to save suitors the unnecessary costs—and the court will probably be obliged to impose this duty on its officers, by ordering that they tax no costs of the printed books to parties whose negligence swells their contents so unreasonably."

## SELECTIONS.

## AN OLD CIRCUIT LEADER.

(From the Law Magazine.)

It is difficult to believe how short-lived is the fame of a favourite barrister on circuit. Such a man usually attains early the summit of success, and during a brilliant career is vastly esteemed, and admired, and courted, not only by the counsel and attorneys, and by the magistrates and country gentlemen, and other residents in the different counties which form his circuit, but also by such of their wives and daughters as have had the good fortune to obtain admission into the Assize Courts, and have there been delighted by the wit and eloquence of the favourite "counsellor." Such a man, within the limits of his circuit, is as famous as a man can well be.

But should it happen that he never attained a judgeship or other signal official dignity, but "died a Nisi Prius leader," it is marvellous how rapidly and completely the recollection of him fades from the memory of the public, and how soon his name is utterly forgotten, even in the fields of his former glory.

Probably there are not many men now surviving who are familiar with the name of John Jones, of Ystrad. But half a century has not elapsed since his name was universally renowned in the principality of Wales, as the idol of his countrymen and the irresistible leader of the old Carmarthen Circuit. The

## AN OLD CIRCUIT LEADER.

Circuit itself, though only abolished in 1830, has so nearly fallen into oblivion that it may be expedient to make some mention of it before introducing its hero.

It was formed of the three Welsh counties of Carmarthen, Cardigan, and Pembroke, and the judges of it had exclusive jurisdiction in all matters both of law and equity arising within those counties. It was usually arranged that the Carmarthen Circuit should not begin till the Oxford had nearly closed; and thus the Oxford Circuit men were enabled to join it. The old Brecon circuit stood on a similar footing, being held before its own Judges for the counties of Brecon, Glamorgan, and Radnor. It was the etiquette of the Bar that silk gowns should not go the Welsh circuits. Nevertheless a very eminent set of counsel used to frequent them. On the Carmarthen Circuit Serjeant Williams was the leader for many years. He was followed by Taunton, afterwards a Judge of the Court of Queen's Bench, and Oldnall Russell, afterwards Chief Justice of Bengal. On the Brecon Circuit, Knight Bruce, afterwards Lord Justice, and Maule, afterwards a Judge of the Common Pleas, were well known for many years. The judges of the old Carmarthen Circuit for nearly a quarter of a century were Serjeant Heywood and Mr. Balguy. They were highly respectable gentlemen, and not without a considerable reputation as lawyers. But they each had the misfortune to be lame, so that, in the lapse of years, the inhabitants got to consider lameness as necessarily incidental to the judicial office, and when at length, on the deaths of these Judges they were succeeded by Mr. N. Clarke, who held the office provisionally during the interval between their decease and the abolition of the Welsh Judicature, a native of Carmarthen was overheard inquiring of a friend whether he had seen the new Judge, and he added, "God bless me, he can *walk* as well as you or I."

The Chief Justice of the Brecon Circuit, for many years, was Mr. Nolan, the King's Counsel, who was eminent for having written a treatise on the Poor Laws, which was, for many years, the standard work on that subject. He dined, during one of his circuits, with Lord Bute, who at the time was entertaining the Duke of Gloucester at Cardiff Castle; His Royal Highness, on learning that the Chief Justice was expected as a guest at dinner, expressed a wish to Lord Bute that he would give him some information about the Judge that he might have something to say to him. Lord Bute said that he knew nothing about Chief Justice Nolan, except that he was the author of a work on the Poor Laws. Accordingly when the Judge was presented to His Royal Highness, the Duke said, with an affable smile, "Oh! my lord, although I have never yet made your acquaintance, I know you well by your valuable book on the poor, and a very charming book it is."

To return to John Jones, the renowned leader of the "Old Carmarthen." He was born at Carmarthen in the year 1777, and very well born both on his father's and his mother's side. He was the only son of Mr. Thomas Jones of Carmarthen, who died in the year 1790, leaving a considerable landed estate to his son, and having appointed for his guardian, his kinsman, Mr. Serjeant Williams, who afterwards became celebrated as the editor of *Saunders's Reports*.

Mr. Serjeant Williams was desirous that his ward should have a first-rate education, and accordingly John Jones was sent to Eton where he remained for some years, and thence he was transferred to Christ Church, Oxford. After quitting Christ Church he proceeded to the Inner Temple, and commenced the study of the law, and shortly after became the pupil of his guardian. But there is reason to believe that he was not a very diligent student of the law. For his cheerful temper and keen enjoyment of intellectual amusements rather led him to the course of life pursued by the Templars in the days of Addison, and he perhaps somewhat answered the description of a "gentleman of wit and pleasure about town."

In 1805, having been called to the Bar, he joined the Oxford Circuit in conjunction with the "Old Carmarthen." As to the Oxford Circuit he neither had, nor desired to have, any business on it. His easy fortune at that time required no addition. But he went regularly to most of the assize towns, enjoying the diversions incidental to a life on circuit, and the society of the agreeable and well-educated companions whom he met with there.

On the Oxford Circuit of that day there was a class of men, which it is to be feared has now ceased to exist, who, like himself, were in opulent circumstances, and went the circuit with no wish to share the emoluments, but merely for its amusements and the pleasant society it afforded. To this class, in John Jones' time, belonged Sir Charles Saxton, Mr. Thompson of Paper Buildings—whose valuable library, enriched by his erudite and accomplished annotations in the margin of his favourite authors, was unfortunately burnt in the fire which commenced in Mr. (afterwards Judge) Maule's chambers. Another member of the same class was Mr. Garland, who used to drive round the circuit in a well-appointed curricule. Those were pleasant days, and John Jones in after years used to narrate very agreeably his recollection of them. But with respect to the "Old Carmarthen," his course was very different. By reason of his family connections he very soon got into business on that circuit, and applied himself to it in earnest. His talents were here speedily recognized, and he continued to rise rapidly till he became in extent of business one of the leaders of the circuit, brilliantly maintaining his position against Taunton and Oldnall Russell in many a hard fought contest. He was not a very learned man, but he had a legal capacity which

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enabled him to act with surprising readiness and tact on the suggestions of his juniors, or those he found on his briefs. Again, he was no rhetorician, but he spoke with ease and fluency—and he had the qualities of sagacity, sound judgment, quickness and dexterity in handling a cause in the highest degree. Add to this that his self-possession and presence of mind never failed him, that he had great powers of ridicule and sarcasm, and an unerring knowledge of the temper and tastes of a Welsh jury. No one will be surprised to hear that a man so qualified became as powerful an advocate as ever practised at the Bar. Besides all these professional advantages, he was in his private capacity the darling of his countrymen; and he was also an especial favourite of the Judges of the circuit, whom he won not only by his frank and pleasant modes of conducting the business, but by the admirable dinners and very choice wines with which he regaled them and the principal members of the Bar on every assize Sunday at Ystrad, his seat in the neighbourhood of Carmarthen. He continued on the circuit till Serjeant Heywood and Mr. Balguy had been removed from it by death. As we have stated they were succeeded *pro tempore* by the well known Queen's Counsel, Mr. Nathaniel Clarke, who was, he said, quite astonished by John Jones's ability as counsel, and added that he believed Erskine himself did not conduct a cause more winningly.

After this description of the man and his powers, the reader will better understand a current tradition that on some occasions, after one of John Jones's felicitous replies, the jury, as soon as the Judge's summing up had closed, without waiting for the officer to take their verdict, would call out, "My lord, we are all for John Jones, *with costs*."

The mention of Ystrad leads at once to recollections of that beloved abode and its pleasant hospitalities. No house in the principality entertained more frequent guests, and it may be confidently said, that no guest ever left without feeling that he had had a most agreeable visit, and had found his host one of the pleasantest of men. Of him it might be truly said:—

"A merrier man,  
Within the limit of becoming mirth,  
I never spent an hour's talk withal."

In an able article in the *Carmarthen Journal*, published the day after his death, it was observed—

"In his private and public capacity he had few equals, and by his talents and public services he acquired a high reputation, and wielded a personal influence greater than any man in this or the neighbouring counties—probably the greatest influence of any private gentleman in the principality."

On the abolition of the Welsh Judicature Mr. Jones retired from the Bar, but his talents were not lost to the community, for he continued to discharge with great ability the duties of Chairman of the Carmarthenshire

Quarter Sessions to the time of his death. The magistrates of the county and the profession testified their high sense of his services in this capacity by presenting him with a service of plate, on which they recorded their sense of his judicial services.

John Jones was for many years in Parliament and was engaged in many arduous struggles to gain that object. In 1818 he unsuccessfully contested the borough of Carmarthen, but was returned for the borough in the next year; and after some other contests he was returned member for the county of Carmarthen in 1837, and retained that seat till his death.

In politics John Jones was the intimate and attached friend of Sir Robert Peel, and, generally speaking, adopted his line of policy. Accordingly, when Sir Robert, in the year 1829, to the great and bitter indignation of his party, abandoned the anti-catholic principles which he had so often and so solemnly professed, and in conjunction with the Duke of Wellington brought forward, and carried, the great Act of Parliament for the Relief of Roman Catholics, Mr. Jones was persuaded, not a little against his own inclinations, to follow Sir Robert Peel in his tergiversation. His conduct in this respect was most disastrous to his own private fortunes. In South Wales there were scarcely any Roman Catholics, but there were a great number of persons bitterly and obstinately opposed to their relief. Amongst them was Mrs. Jones, of Tyglin, the daughter of his great uncle Mr. Jones, the proprietor of the estate. By his will he bequeathed it to his daughter in such terms as were decided by the Court of King's Bench to amount to a gift of an estate-tail, with remainder, "to my nephew, John Jones, now at Eton School." His daughter, on hearing that her cousin had been persuaded to give his vote in the House of Commons in favor of Roman Catholic relief, fell into a frenzy of passion, and vowed most solemnly that, if she could prevent it, not an acre of the Tyglin Estate should ever go to John Jones. And she immediately sent for her solicitor, and instructed him if possible to cut off the entail which had been made in his favor. This was done, and unfortunately, for Mr. Jones, too well done, for the Court of Queen's Bench, in a law-suit which took place after her death, between John Jones and a stranger to whom she had bequeathed the estate, decided after solemn argument that she had the power to cut off the entail and to deprive Mr. Jones of the estate in favour of her own devisee—and thus, by this calamitous vote, Mr. Jones was deprived of an estate with a rental of at least £3,000 a year.

Mr. Jones died in the year 1842. His funeral was attended by an immense concourse of mourners of every class. All the shops of the town of Carmarthen were closed, business was entirely suspended, and everything was done by the inhabitants to manifest the depth and sincerity of their regret. But eminent

## THE FIRST REPORT OF THE JUDICATURE COMMISSION.

and beloved as he was, he has already ceased to form a topic for public conversation. There are still some few who like to talk over the days that are gone by, and to recount his popularity and his triumphs at the Bar and on the hustings. But considering that a quarter of a century has scarcely elapsed since his death it is surprising, and somewhat melancholy, that so few tongues continue to speak of the once famous JOHN JONES, OF YSTRAD.

## FIRST REPORT OF THE JUDICATURE COMMISSION.

(From the Law Magazine.)

We rejoice to find that the changes advocated in this Magazine have found favour with the Judicature Commissioners. There has not, probably, for years been a Commission whose labours have proved so thoroughly satisfactory to the public. There is not the slightest hesitation in suggesting the eradication of proved abuses, however venerable from their antiquity. How best to promote the convenience of suitors, and of the public at large, has been the single aim of the Commission.

The Commissioners propose that the Superior Courts of Law and Equity, together with the Courts of Probate, Divorce, and Admiralty, should be blended into one Court, to be called "Her Majesty's Supreme Court." This Court is to be divided into as many chambers or divisions as the convenient despatch of business may require. All suits are to be commenced with a document called the writ of summons, such writ to be specially endorsed with the amount sought to be recovered; a short statement of the facts constituting the plaintiff's cause of complaint—not on oath—called the declaration, to be delivered by the plaintiff to the defendant. Thereupon the defendant should deliver to the plaintiff a short statement, not on oath, of the facts constituting the defence, to be called the Answer. When new facts are alleged in the Answer, the plaintiff should be at liberty to reply. The proceedings should not go beyond the reply, except by permission of the judge. As to the mode of trial, great discretion should be given to the Supreme Court, and any questions to be tried should be capable of being tried in any division of the Court, (1) by judge, (2) by a jury, (3) by a referee. There should be attached to the Supreme Court, officers called official referees. Evidence, as a rule, to be taken by oral examination in open Court, except upon interlocutory application, in which case the evidence, as a rule, is to be taken by affidavit. If Terms are not to be abolished, it is recommended that there should be three instead of four Terms, commencing on November 2, January 11, and May 1, in each year. No distinction to be made between business capable of being transacted in Term and out of Term. The venue for trials to be enlarged, and several counties to be consolidated into districts of a convenient

size, and that such districts should, for all purposes of trial at the assizes, both in civil and criminal cases, be treated as one venue or county. Among other recommendations regarding juries, the Commissioners recommend that aliens, having been resident in this country for ten years, should be liable to serve as jurors, and that alienage should not be ground of challenge. The right of an alien to claim a trial by a jury *de medietate lingue* to be abolished.

On the important subject of Appeals, the Commissioners, after some very proper and justifiable strictures on the inconveniences of the present appellate system, recommend the establishment of a Court of Appeal, consisting of six permanent judges, and three judges of the Supreme Court to be nominated annually by the Crown. A direct appeal to the House of Lords to be allowed in those cases where the respondent consents, but not otherwise. No appeal, as a general rule, to be allowed as to costs only.

We think that some exception may be taken to the name of Supreme Court as applied to a court from which there are a succession of appeals. We regret to find that the Commissioners have not thought fit to diminish the number of appeals. While putting an end to the absurdity of the Exchequer Chamber, and establishing a strong Court of Appeal in its stead, they yet allow the judgment of this Court to be subject to an appeal to the House of Lords. The consequence might be, that a well-considered judgment of nine judges might be upset by two or three law lords. We should rather prefer that there should be no appeal from the Court of Appeal to the House of Lords, but that the law lords should form part of the Court of Appeal. The appellate court would thus be strengthened, and the mischief of the double appeal abolished. Mr. Ayrton very properly questions "whether it is desirable to allow such facilities for appealing and repetition of appeals." The Commissioners seem, however, to think it beyond the scope of their authority to suggest any change with regard to the appellate jurisdiction of the House of Lords.

We rejoice to find that the Commissioners recommend that the present preposterous system of four legal Terms should be abolished, and that in case it should be thought advisable to retain any system of legal terms at all, there should be three Terms at convenient periods of the year.

## DR. COLENZO.

Can Dr. Colenso be tried for heresy? Such, in effect, is the question to which public attention has once again been invited. Although the Bishop of Natal has been the "hero of a hundred suits," for some cause or other no competent tribunal has pronounced as yet on his orthodoxy. To only one indeed, that of the Bishop of Capetown sitting at Capetown as Metropolitan, has it ever been submitted.



## DR. COLENZO.

It might perhaps have been raised before the Privy Council on the appeal brought by Dr. Colenso against Dr. Grey's decision (see 13 W. R. 550). But no doubt both parties were soundly advised in limiting their arguments to the question of jurisdiction. Again, the "merits of the case" might have been investigated before the Master of the Rolls in the *Bishop of Natal v. Gladstone and others*. 15 W. R. 29, L. R. 3 Eq. 1. In that suit the defendants, if they had attempted to establish and had succeeded in establishing the plaintiff's heterodoxy, must have won the victory. They preferred to rest their argument on the supposed invalidity of the patent of Dr. Colenso, and abstained purposely from raising any argument on his opinions.

"I have not to consider" said the Master of the Rolls, in delivering his judgment, "whether the plaintiff, by false and erroneous teaching or doctrine, or in any other manner, has mis-conducted himself as a bishop. I have nothing to do with the question whether his works have or have not an heretical tendency. *That question might have been raised and might have had an important bearing on the question whether the plaintiff is or is not entitled to be paid the salary in question; but that question not only is not raised but it seems to have been on both sides carefully excluded from the pleadings.*"

The result of this course of proceeding was total failure, and now the advisers of the Propagation Society, who were the real defendants, may possibly regret that a more extended line of defence was not adopted. The appeal from Lord Romilly would, moreover, have eventually reached the House of Lords, where the presence or at least advice of the bishops might have lent additional authority to the judgment which the lay peers would have delivered. This golden opportunity, however, was lost. Dr. Colenso still remains in possession of his bishopric and of the funds attached to it, and according to the opinion just published of the Solicitor-General, Sir Roundell Palmer, and Dr. Deane, it has become next to impossible to dislodge him. He cannot be proceeded against in Natal; he cannot be proceeded against, *as a bishop*, in England. As a clerk in holy orders, the learned writers intimate that he might be liable to penalties in an English Ecclesiastical Court. But this opinion is really theoretical, for it supposes first that Dr. Colenso should voluntarily put himself within the jurisdiction of our courts, and secondly, that his offence has been committed within two years of the commencement of a suit against him. With regard to the first point, there is little doubt from his public declarations that he would come to England on purpose to be tried, but the second is an insuperable objection. Much more than two years has elapsed since the famous commentary on the Pentateuch was published, and the bishop's ambition for martyrdom will scarcely be keen enough to induce him to publish the

same opinions afresh in order to facilitate the action of his opponents.

But is it so certain, after all, that Dr. Colenso is not amenable to the general ecclesiastical law? He is continually claiming the position of a "Crown" bishop. Is he to be permitted to enjoy that distinction without submission to its inevitable disabilities? "It has been suggested," says the "opinion," "that the Crown, as visitor or as supreme in causes ecclesiastical or by virtue or in exercise of some other supposed power, may be able, either by Commissioners specially appointed or by means of the Privy Council to hear and determine the points raised against Dr. Colenso. We are unable to find the slightest ground on which this suggestion can be supported." On the other hand we venture to maintain that a trial "by Commissioners specially appointed" might legally be held. It is contended that such a mode of proceeding would be a revival of the High Commission Court which was abolished by the 16 Car. 1, c. 11. But that court existed under an Act (1 Eliz. c. 1), which was not an exacting, but a declaratory statute. By virtue of its provisions a permanent tribunal was erected, which was happily abolished by the Long Parliament, and the reconstruction of which was forbidden by the 13 Car. 2, c. 2. The repeal of the sections of the 1 Eliz. c. 1, enabling the Sovereign to appoint a high commission court, leaves the ancient prerogative of the Crown as supreme visitor untouched. The law is laid down on this subject with great exactness in *Cawdrey's case*, Co. Rep. pt. v., p. 8. "It was resolved," says Lord Coke, "by all the judges that if that Act (*i.e.*, the 1 Eliz. c. 1) had never been made, the King or Queen of England, for the time being, may make such an ecclesiastical commission as is before mentioned by the ancient prerogative and law of England." If this statement of the law be accurate, the repeal of 1 Eliz. c. 1, really does not touch the question. The Crown had the power to appoint commissioners before the Act, and possesses it still, although the Act be now repealed. The point, at all events, we venture to submit, is worth discussion. It is by no means so clear as the "opinion" would seem to indicate. A suggestion supported by the high authority of Lord Coke can scarcely be deemed entirely destitute of foundation.

There remains a second method of trying conclusions with Dr. Colenso, which was pointed out in last Tuesday's *Times* by Mr. Forsyth. If the trustees of the Propagation Society again decline to pay Dr. Colenso his stipend, a new chancery suit will be the consequence; and on this occasion the defence that the plaintiff holds opinions not in accordance with the formularies of the Church of England can be set up. In either of these two ways, therefore, Dr. Colenso can, we believe, be brought to trial. It is certainly a "wrong," that if he really does hold heretical views, he should continue to draw the funds of the orthodox;

## CRIMINATING INTERROGATORIES.

and in this case, as in others, it will probably be found that the old maxim will apply, and that the wrong is not without its appropriate remedy.—*Solicitors' Journal*.

## CRIMINATING INTERROGATORIES.

During the last year there has been an unusual number of decisions upon questions concerning the practice which ought to be followed at Judges' Chambers in allowing interrogatories, which are now so much used in obtaining evidence in a cause before it comes to trial. We propose here to examine the state of the law on one branch of this question—viz., the right to administer interrogatories the answer to which may tend to expose the person answering to criminal proceedings, penalties or forfeiture. The cases are by no means in accordance with one another, and it will therefore be necessary to examine the more important decisions which have been given upon this subject.

The power of administering interrogatories was first given to litigants at Common Law, by section 51 of the Common Law Procedure Act, 1854, which enables either plaintiff or defendant, by leave of the court or a judge, to interrogate the opposite party "upon any matter upon which discovery may be sought." This section has been the subject of a great many decisions, but we shall confine ourselves here to the consideration of those cases in which objection has been raised to the administering of interrogatories on the ground that an answer to them might tend to criminate the person interrogated.

One of the first questions which arose on this section with reference to criminating interrogatories was, whether courts of law were bound to follow the principles and practice by which courts of equity were governed in dealing with bills for discovery. The cases of *Burtlett v. Lewis*, (81 L. J. C. P. 238), *Bickford v. Darcy* (14 W. R. 900), and *Pye v. Butterfield* (13 W. R. 178) have now established that the common law courts will not necessarily be governed by the rules which regulate discovery in equity, although they will examine those rules as a guide to assist them in determining their own practice in such cases.

The broad general rule in equity as to criminating interrogatories is, that "no person is compellable to answer any question which has a tendency to expose him to a criminal charge, penalty, or forfeiture;" *United States of America v. McRae* (15 W. R. 1128). This rule is as well known at law as in equity; no witness is bound to criminate himself, and therefore, every witness is privileged from answering any question which has a tendency to criminate him. A witness, however, is not privileged from being asked such a question; he is only privileged from answering it—that is, the objection must come from the witness

himself on his oath. So in equity a defendant, in order to protect himself from answering on the ground, that the discovery of the matters inquired after would tend to expose him to penalties, must state on oath his belief that such would be the case. A submission of the question to the Court is not sufficient (*Daniell's Ch. Pr.* 4 ed., vol. 1, 521, citing *Scott v. Miller*, 7 W. R. 561).

A party to a cause interrogated at law is clearly not bound to answer criminating questions: *Pye v. Butterfield* (13 W. R. 178), but the question raised on criminating interrogatories has usually been, not whether the party interrogated is bound to answer, but whether the other side is entitled to ask the question, and thus compel the party interrogated to rely on this privilege as a reason for not answering. This point must, of course, be raised when application is made for the necessary leave to administer the interrogatories, at which time the person whom it is proposed to interrogate is always entitled to be heard.

It will be convenient to enumerate shortly the cases on this point in the order of their date. In *May v. Hawkins* (3 W. R. 550, 11 Ex. 210), interrogatories inquiring as to a forfeiture were not allowed. The case was actually decided upon a point of practice, but Parke and Martin, B.B., both expressed an opinion that such interrogatories ought not be allowed. In *Osborn v. The London Dock Company* (3 W. R. 238) the most frequently cited of the earlier cases on this subject, it was held that interrogatories having a tendency to criminate might be administered, and that any objection to them on this ground must be made by way of answer on oath of the person interrogated. Alderson, B., said, "the proceeding is analogous to that of an examination of a witness at a trial. It seems to me that the same rule should be followed." And Parke, B., said, "The plaintiff must be put upon his oath; and when he finds any question pinch him, he must object to it." This case was followed in *Chester v. Wortley* (4 W. R. 325), where interrogatories were allowed in an action of ejectment, although they inquired into matters which might be evidence of a forfeiture. The same principle seems also to have been approved of in *Simpson v. Carter* (6 H. & N. 751); the report of this case is, however, only given very briefly in a note. Up to this time the decisions (*May v. Hawkins* only contains *dicta* to the contrary) seemed clear as to the practice of allowing criminating interrogatories. In *Tupling v. Ward* (9 W. R. 482) the Court of Exchequer first acted on a different principle. It was an action for libel, and it was admitted that the defendant, whom the plaintiff wished to interrogate, would not have been bound to answer, as the questions inquired as to the writing of the alleged libel. The Court refused, as a matter of general discretion, and without laying down any general rule, to allow the interrogatories, on the ground

## CRIMINATING INTERROGATORIES.

“that it would not be fair to submit to the defendant questions which he is not bound to answer.” In *Bartlett v. Lewis* (31 L. J. C. P. 230) interrogatories were allowed, although they had a tendency to criminate. In *Baker v. Lane*, an action for libel, criminating interrogatories were refused, but no reasons were given for this judgment. The case was, however, subsequently explained by the same Court in *Bickford v. Darcy* (14 W. R. 900), when the ground of the decision in *Baker v. Lane* was stated to be that the Court thought that the interrogatories were not put *bonâ fide* for the purposes of the action. The decision in *Bickford v. Darcy* was that criminating interrogatories should be allowed in that case, as they were *bonâ fide*, and were not directly and necessarily criminating. The interrogatories in *McFadden v. The Mayor &c. of Liverpool* (16 W. R. 1212) were allowed, although of a criminating tendency. Bramwell, B., there says, “I think that unless we see the question to be clearly objectionable, we ought to allow it to be put, and let the objection be made when the party interrogated comes to answer the questions.” Martin, B., dissented from the majority of the Court, on the ground that “a man ought not to be asked such questions that he must either criminate himself or refuse to answer them.” *Edmunds v. Greenwood* (17 W. R. 142) was an action of libel. The interrogatories there went directly to the questions in issue between the parties. They asked the defendant as to the way in which the alleged libel was composed, as to its publication and as to surrounding circumstances from which legal malice might be inferred. The Court refused to allow these interrogatories to be administered, as “their direct and express tendency was to make the defendant criminate himself, and if he answered in the affirmative, to subject him to criminal proceedings.” The judgment concludes by saying that, “the express and avowed object here, is to put questions in order to compel the defendant to criminate himself. But in the absence of special circumstances, we are of opinion that interrogatories ought not to be allowed in actions of this description.” The last case in the common law courts was *Villesboinet Tobin* (17 W. R. 322), which was an action for misrepresentation. There the interrogatories were not allowed. Keating, J., observed in his judgment, “that the cases on the subject are numerous, and difficult to reconcile.” Montague Smith, J., says, “The only intelligible rule to be deduced from all the cases, including *Edmunds v. Greenwood*, seems to be that when interrogatories are put *bonâ fide* to elicit what is relevant to the issue, they may be allowed, though the answers may tend to criminate; giving the party interrogated the option of answering or refusing to answer on that ground. But where interrogatories are so put the Court and the Judge at chambers will require a stronger case and reasons than in ordinary cases.”

The result, therefore, of the cases in the common law courts on this subject seems to be that the mere fact that interrogatories have a tendency to criminate will not *per se* be a reason for refusing them. It is, however, always a matter for the discretion of the judge at chambers, or of the Court, whether interrogatories should be allowed in any action. Neither party to an action has an absolute right to administer interrogatories. He can only do so by obtaining leave or showing some reason why interrogatories ought to be allowed. This being so, it seems that the judge or Court will be slow to allow interrogatories having a tendency to criminate, unless there is some special reason for them.

This question has recently, in *The Mary or Alexandra* (17 W. R. 551), come for the first time before the Court of Admiralty, which, by 24 Vic. c. 10, s. 17, has all the powers possessed by any of the superior courts of common law, to compel either party in any cause or matter to answer interrogatories. Sir. R. Phillimore allowed criminating interrogatories, saying “if the defendant states upon oath his belief that an answer to any particular interrogatory would subject him to penalties, he will not be compelled to answer such interrogatory. This decision was given on the ground that the questions were relevant and reasonable, and that a statement on oath of the person interrogated is necessary, and that it is not enough that he should submit that they are not proper questions. The judgment in *The Mary or Alexandra* thus agrees with the decisions at common law, so far as any principle can be obtained from those cases.

It may, at least, be safely assumed that, whatever difficulty there is in reconciling all the cases on this subject, there is a recognised distinction between the right to administer criminating and non-criminating interrogatories. It is more difficult to obtain leave in the former than in the latter case.

It is always much to be regretted that there should be any conflict between decided cases, but when such conflict does exist, it is peculiarly the time for suggesting what the law on the disputed point ought to be. It seems to us that the simplest and the best way of deciding this matter would be to ignore, on the application for leave to administer interrogatories, the question whether they are or are not criminating. Let this matter be left until the answer is made. Of course, if interrogatories are not relevant to the purposes of the action, they ought not to be allowed, but this applies to all interrogatories. There seems no reason whatever why criminating interrogatories should stand on a different footing from others. There is, as we have said, no privilege from being asked a question either in equity or at a *Nisi Prius* trial. In each case the person questioned must claim his privilege on oath, and the same principle ought to be applied to common law interrogatories.

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 LIABILITY OF THE FIRM FOR THE ACTS OF A PARTNER.
 

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All this question of criminating interrogatories would never have arisen if interrogatories might be administered at common law as in equity without obtaining leave first. If there is any objection to them the person interrogated could apply for any alteration he might wish to have made, but the first application should come from him, and not from the other side. Nothing so much encourages idle objections and fruitless resistance as the refusing leave for that which in the great majority of cases ought to be granted as a matter of course. The system invites all sorts of unnecessary and mischievous, because expensive opposition. It is now usual to oppose all interrogatories on all occasions, although they may be quite unexceptionable. If the objection had to come after they were administered, it could only be made when there was really some sufficient ground at least for discussion. This, however, is a matter which is not confined to the administering of interrogatories alone, it applies quite as forcibly to the necessity of obtaining leave to plead several matters, no matter how much a matter of course it may be to plead the required pleas. We hope that when any changes are next made in the practice at judges' chambers, the rule requiring leave to administer interrogatories, and to plead several matters, will be abolished.—*Solicitors' Journal*.

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 LIABILITY OF THE FIRM FOR THE ACTS OF A PARTNER.
 

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The question under what circumstances the receipt of a client's money by one member of a firm of solicitors constitutes a receipt by the firm so as to render them jointly and severally liable therefor, is a question which involves not only some consideration of the law of partnership, but also of the general relations between solicitor and client. It is a fundamental axiom of the law of partnership, that the act of one partner does not bind the rest, unless it fall within the general scope of the partnership. Where it is sought to charge the firm with liabilities occasioned by the act of a single member, the first question is, whether the act which occasioned the liability relates to the partnership. If it does, then it is well settled that the act of the single partner binds all the others (*Hope v. Cust*, 1 East 58).

In those unfortunate cases which sometimes occur, where a suit is instituted to make the partners in a firm of solicitors liable for moneys misappropriated by a defaulting partner, the chief question is, whether the money so misappropriated came to the hands of the defaulting partner in the ordinary course of the business of the firm. If it did, then the firm are liable. And this, as we shall presently see, may lead to nice questions as to what is the ordinary course of business of a solicitor *qua* solicitor, when he is not acting in pursuance of any special authority given to him by his client.

As a general proposition it has been said that it is not in the ordinary course of a partnership business of solicitors to receive money for their clients. This point was raised in *St. Aubyn v. Smart* (16 W. R. 894, 1095), where a client who was entitled to a share in a fund in court gave a power of attorney to the firm of solicitors who had acted for him in the matter to receive the money. The power was a joint and several power, and one of the partners to whom it was forwarded availed himself of it to obtain the money, which he paid into his own account and afterwards absconded. The Lords Justices, affirming Vice-Chancellor Malins, held that this money must be treated as having come into the hands of the firm in the course of their business as solicitors, it being the ordinary course of business at the end of a litigation for the solicitors to receive the fruits of that litigation for their clients. The case went a good deal on the knowledge of the transaction which the firm were constructively deemed to have possessed; but is at any rate an authority for it being in the ordinary course of business for solicitors to receive money for their clients, when that money is the fruit of the litigation they have conducted to a successful issue. We shall presently see that the general proposition above stated must be accepted with considerable modification.

It is not within the scope of the ordinary business of a solicitor to receive money from a client for the general purposes of investment (*Harman v. Johnson*, 2 E. & B. 61). But it seems that if money be deposited with one partner by a client of the firm for the purpose of being invested in some particular security, and the partner misapply the money, the other partners may be made jointly and severally liable to account for it, on the ground of the transaction being within the ordinary course of business of solicitors.

Thus in the well known case of *Blair v. Bromley* (5 Ha. 556, 2 Phil. 354), the client had handed a sum of money to a partner in the firm for the purpose of being invested on a particular mortgage. The recipient partner presently represented to the client that the money had been so invested, and paid him regularly what professed to be the interest on the mortgage, until the partner became bankrupt. It was then found out, twelve years after the transaction took place, that the recipient partner had misappropriated the money. It was argued in that case that it was no part of a solicitor's ordinary duty to receive money to lay out on mortgage for his clients. That may be so where no particular mortgage security is in contemplation. But in *Blair v. Bromley* the representation was that a particular security was in contemplation. That being so, to receive a client's money for the purpose of being invested on it was within the ordinary course of business, and the defaulting partner had power to undertake on behalf of the firm the transaction which he professed-

## LIABILITY OF THE FIRM FOR THE ACTS OF A PARTNER.

ly undertook on their behalf; and, therefore, his unfortunate partner, though he had had no opportunity of knowing anything of what was being done, was necessarily held liable for the acts of the other no less than six years after the partnership had come to an end.

Vice-Chancellor Wood, in *Bourdillon v. Roche* (6 W. R. 618), considered at some length the position and duties of solicitors in this respect. The decision was that it is no part of a solicitor's business *quid* solicitor to receive on behalf of his clients money coming to them upon payment of a mortgage debt, or to retain such money for the purpose of investment generally. For a specific investment, we have already seen, it is quite in the ordinary course of business so to retain it, as the money in fact merely passes through his hands, and he is not the custodian of it, unless during the limited period which precedes the re-investment of the fund. In *Bourdillon v. Roche*, where a mortgage had been paid off and the money was retained by the defendant's partner for re-investment, and misapplied by him, the bill, which sought to make the defendant liable as well as the estate of the partner who misapplied the money, was dismissed as against the defendant, upon the ground that there was no evidence that the money was received for the purpose of being invested on any specific security, and, therefore, that the transaction was not within the ordinary range of business of a solicitor.

The receipt of money to be laid out on a specified security is said to be within the ordinary course of business, but the receipt of purchase-money on a vendor's behalf not. *Viney v. Chaplin* (6 W. R. 562), which is the authority for the latter proposition, and is explained by the Vice-Chancellor in *Earl of Dundonald v. Masterman* (17 W. R. 548, L. R. 7 Eq. 504), only goes to this, that a solicitor as such has *not*, as against his client, authority to receive that client's money; but it does not touch the question now before us.

The cases appear to come to this, that a solicitor who acts strictly in his professional capacity does not receive money on behalf of his clients, unless to be invested in a *specific* security or applied in a particular manner. *Atkinson v. Mucreth* (14 W. R. 888), was a case where one of a firm of solicitors received a sum of money from a client, part whereof was to go in payment of their bill of costs, and the residue was to be applied towards effecting an arrangement with the client's creditors. The solicitor misappropriated the money. It was argued that the purpose for which the balance of the money was given—viz., the arrangement with the creditors—was a general purpose analogous to the case of money being handed to a solicitor for investment generally, which is a scrivener's business, and not a solicitor's. The Master of the Rolls, however, held on demurrer that the liability was joint and several, thus admitting that the undertaking to apply the balance as

above mentioned was within the scope of a solicitor's business.

In *Withington v. Tate* (17 W. R. 247) the question was whether a mortgagor was fairly entitled to assume that the mortgagee's solicitor was the proper person to receive the money as agent for the mortgagee. Lord Romilly, M. R., held that he was not, and on appeal Lord Hothly, C., took the same view, that the mortgagor had paid the money on his own wrong, inasmuch as he was not authorised to pay it to the solicitors.

*St. Aubyn v. Smart* is noticeable for the question which arose in it as to the jurisdiction of the Court in these cases. That there is a remedy at law in most cases is certain, but, where the lapse of time has barred this, there is still a remedy in equity, provided there had been misrepresentation leading to the fraud complained of. In *Blair v. Bromley* the misrepresentation was made in 1829, and the discovery of it was not made until 1841, while the partnership had been dissolved upwards of six years. At law, therefore, the remedy was gone. But in equity, in the opinion both of Sir James Wigram and Lord Lyndhurst, the effect of the misrepresentation was the same as if it had been made on the day when the fraud originated by it was found out; and that the right to relief against the several partners was not gone by reason of the firm having been dissolved more than six years before.

In the latest case on this subject, the *Earl of Dundonald v. Masterman*, the Earl, in the course of an arrangement of his affairs, in which the defendants' firm were his professional advisers, remitted a bill for a large sum to England, which bill was endorsed to the member of the firm who had throughout taken charge of the Earl's affairs, and by him discounted. The balance of the amount so obtained was misapplied by the partner in question, who absconded; and the suit was instituted to make the remaining partners liable for the acts of their former partner. As in *St. Aubyn v. Smart*, the defendants were precluded from making out that the plaintiff had employed the defaulting partner, and not the firm, by the circumstance that the bills of costs were made out in the name of the firm, and discharged by payments made to them. The main question was, as in the other cases, whether it was within the ordinary business of the firm so to receive money for a client, and the Vice-Chancellor, following the foregoing cases, was clearly of opinion that it was. The bill was transmitted to England for the purpose of providing a fund to pay the creditors; it was endorsed to the defaulting partner; he discounted it. The cheque thus obtained was made payable to the order of the firm, and the defaulting partner obtained the money, part of which he appropriated by using the firm's name in endorsing the cheque. It was one of those unhappy cases where some one or other innocent person must suffer, and the remain-

## LIABILITY OF THE FIRM FOR THE ACTS OF A PARTNER—ITEMS.

ing partners suffered because they had placed confidence in him, and held him out to the world as a person for whom they were responsible.

Another branch of the case, somewhat resembling *Ooomer v. Bromley* (5 DeG. & Sm. 532), requires a passing notice. Two of the three partners—the defaulting and another—were trustees of a trust deed executed by the Earl, and a portion of the proceeds of the bill was paid to them. The Vice-Chancellor, as in *Ooomer v. Bromley*, held that this money was paid to them as trustees, and not as members of the firm, and that the partnership was entitled to be discharged in respect of it. The first branch of the case resembles *Atkinson v. Mackreth*, to which we have already referred, although the circumstances are more complicated. What we deduce from the cases above, of which we have given an imperfect summary, is, that the scope of a solicitor's business does extend to the receipt of money for specific objects, but not for general purposes, and that to receive money for arrangements with creditors, paying legatees, paying into court, and in short, for any specific purpose connected with the professional business then in hand, are within the scope of a solicitor's ordinary duty quite as much as they undoubtedly are at the present day within his every-day practice.

It must not be forgotten that solicitors now act far more as general family agents than they formerly did. This fact will have to be borne in mind in considering the older cases, which were decided in days when the public required far less of the profession than they do now, that there is hardly a conceivable form of business, that a solicitor may not be called on to supervise or undertake on behalf of his client.—*Solicitor's Journal*.

The *Chicago Legal News* is responsible for the report of the judgment of Williams, J., in *Ticknor v. Ticknor*, a part of which we record as something "almost too good to be true." If the legal ability of this "gushing" judge is to be measured by his efforts in the poetical line, he must indeed be a treasure.

An application was made to remove some children from the custody of the mother, who after living in adultery with one Fishburn, subsequently married him, having obtained a divorce by consent from her first husband:—

"And yet no questions of greater difficulty and delicacy ever present themselves to a chancery than those arising in this class of cases. The dearest rights and tenderest feelings of our humanity are involved in the issues which are to be determined, and the judge who can pass judgment upon questions with the settlement of which must be connected the crushing of long cherished hopes, the breaking of heart strings, upon which hangs the future happiness or misery of parents and their innocent offspring, without a painful sense of his

responsibility, is more or less than man. In the case before me, the petitioner is the father of two sweet and promising children. They are bone of his bone and flesh of his flesh. He fondled them in their early infancy, nursed them in their sickness, fed and clothed them by his toil, and with the pride which only a father can know, watched their physical and mental development, as like buds they have been silently opening beneath his eye. If he is so depraved as the eloquence of the complainant's solicitors have represented him to be, from the exhaustless fountain of a father's love affection is yet poured forth for them. Whatever else he may be, *he is a father*, and so long as the sacred record exists, luminous with the love of our Father in Heaven, so long will the words, 'Like as a father pitieth his children,' be suggestive of unfathomable depths of human and divine sympathy and tenderness.

On the other hand is the mother, whose love antedated the birth of these little ones, who, for them, patiently bore the anxious sorrows of anticipated maternity, and those keener pangs through which they were ushered into being, whose arms were their cradle and whose bosom their pillow through the days and nights of helpless infancy. Were she the abandoned creature that she has been pointed to be by the defendant's counsel, still she is a mother, and the question of the Hebrew prophet has, by the lapse of time, lost nothing of its pregnant significance,—'Can a mother forget her suckling child that she should not have compassion on the child of her womb?' I assume, therefore that I have to deal with the parents who, whatever be their disregard of conjugal vows, or their personal delinquencies or crimes, have bosoms warmed with fire of parental love towards their offspring."

The mother carried the day.

The vice of irresistible drunkenness is an apt illustration of the transitional form of incapacity and irresponsibility in which physiological and pathological conditions combine. Nothing is more certain than the fact that a man having attained adult age, with all the responsibilities of a husband, father, and citizen, becomes an incorrigible drunkard, and quite incapable, from bodily causes, of performing his duties. He is too often a brutal ruffian, commonly a prodigal and a fool, yet the law of England does not provide for an inquiry into his capability of self control, except in so far as to whether he be insane or not. Pending the solution of this insoluble question, he breeds drunkards to the third and fourth generation, ruins his family, and too often it is only bodily weakness, suicide, raving insanity, or an early death from disease, which saves him from the gallows. Surely common sense, Christian ethics, and medical science are agreed here, that it is a question of capability for the performance of duty with which society has to deal, and not a metaphysical question as to insanity. Probably in practice such a method of dealing with these cases would prove the most efficient check on the vice itself.—*Lancet*.

C. L. Cham.]

IN RE HICKS, AN INSOLVENT.

[C. L. Cham.]

## ONTARIO REPORTS.

## COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

## IN RE HICKS, AN INSOLVENT.

*Insolvent Act, 1865, sec. 29—Order for committal without summons to shew cause.*

An insolvent cannot legally be committed under sec. 29 of 29 Vic. cap. 18, without an opportunity of shewing cause, and it should appear in the order of committal that the insolvent has had notice of the order for delivery, &c., for non-compliance of which an order of committal is asked.

[Chambers, April 22nd, 1866.]

This was an application to discharge a prisoner on a writ of *Habeas Corpus*.

The return set out an order of the Judge of the County Court of Prince Edward, for the commitment to the county gaol of the insolvent, for nine months, unless certain moneys and notes were sooner delivered up according to a previous order.

The order, directed to the sheriff, &c., was as follows:—

"Upon the application of the official assignee for the County of Prince Edward, and upon reading an order made by me on the twenty-seventh day of February last past, and the affidavits thereto attached, by which order the said D. S. Hicks was directed to deliver to one of the persons in said order named, the sum of twelve hundred dollars, and also certain promissory notes in said order mentioned, upon or before a day now past, and upon it appearing to me that said money and notes have not, nor hath any portion thereof been delivered as ordered as aforesaid.

"I do order that the said D. S. Hicks be imprisoned in the Common Gaol of the County of Prince Edward for the space of nine months, unless said sum of money and notes be sooner delivered. And I do order you, the said sheriff of the County of Prince Edward, to take, or cause to be taken, the said D. S. Hicks, and him safely to convey to the common gaol at Pictou, in the said County of Prince Edward, and there to deliver him to the keeper thereof, together with this precept. And I hereby command you, the said keeper of the said common gaol, to receive the said D. S. Hicks into your custody in the common gaol, there to imprison him for the space of nine calendar months, unless the said sum of twelve hundred dollars and notes shall be sooner delivered, and for your so doing, this shall be your sufficient authority."

The order was made under section 29 of the Insolvent Act of 1865, which enacts that, "If, after the issue of a writ of attachment or assignment, &c., the insolvent retains or receives any portion of his estate, &c., the assignee may make application to the judge by summary petition, and after due notice to the insolvent for an order for the delivery over to him of the effects, documents or moneys, so retained, and in default of such delivery in conformity with any order to be made by the judge upon such application, such insolvent may be imprisoned in the common gaol for such time, not exceeding one year, as such judge may order."

Many objections were taken to the sufficiency of this warrant.

C. S. Patterson, in support of it, conceded that he could not place it on any higher ground than an order to commit for unsatisfactory answers to interrogatories, or for not appearing on a judgment summons.

J. A. Boyd, for the prisoner.

HAGARTY, C. J., C. P.—One most formidable objection, is the absence of any averment of notice to the insolvent, or of any opportunity given to him to shew cause against his commitment to gaol. The order appears to be made merely on proof of his non-compliance with the previous order, to deliver over the money and notes.

The very nature of the proceeding would seem to require the insolvent to be called on to shew cause before being committed. Many reasons may be suggested why the order was not complied with at once. Illness or other disability, the intermediate loss or destruction of the property might render compliance excusable or impossible, or at all events operate on the exercise of the discretionary power of commitment.

The often cited case, *Ex parte Kinning*, 4 C. B. 511, is directly in point. The judge there had power to commit for any time not over 40 days if the debtor did not pay the debt at such time as ordered by the court or judge. The order to commit set out the order to pay, default in payment after demand and service of original order, and then, without averring any further notice to defendant, or opportunity given him to be heard, he was committed for forty days.

The Court of Common Pleas discharged him on *Habeas Corpus*. The act of committal was held to be a judicial, not a ministerial act. *Moule, J.*, adds "upon every principle of law and justice it is right that the party should have an opportunity of being heard before this punishment is inflicted upon him, \* \* \* the debtor is entitled to notice, and has a right to be heard before he can be committed for disobedience of the order."

*Wilde, C. J., Coltman and Creswell, J. J.*, all give judgments to the same effect.

The law is fully reviewed in our own case of *Bullen v. Moodie et al.*, 18 U. C. C. P. 182, and the same view expressed. See also *Baird v. Story et al.*, 28 U. C. Q. B.

I have nothing before me warranting the imprisonment of the insolvent except this order, and it seems to me to be defective. For all that appears therein, the insolvent may never have had any notice of the order made by the judge for the payment and delivery of the money and notes. It merely avers that such an order was made, and the money and notes have not been delivered in accordance with it.

This objection is in addition to that already discussed as to the committal without an opportunity given to insolvent to be heard. The latter defect seems to be fatal, without reference to any of the other points taken.

I think I am bound to order the discharge of the prisoner.

*Prisoner discharged.*

NOTE.—It would be well if all these orders should contain a short recital of matters, so as explicitly to bring the case within this 29th section, and setting out the substance of the

C. L. Cham.] REGAN v. MCGREEVY—WALKER v. DONOVAN—SIMCOE v. NORFOLK. [Ap. Case.]

order made on the assignees application, and notice to the insolvent. Thus the service of the order, or at least, averment of notice being given of it to insolvent, and a demand of the delivery &c., of the things ordered to be delivered, and then notice of the application to commit and opportunity of being heard against it, and then the order to commit. The statute it may be observed is silent as to any alternative committal.

## REGAN v. MCGREEVY.

*Examination of judgment debtor—Residence within jurisdiction—Member of Parliament.*

An order will not be made for the examination of a judgment debtor whose home is in the Province of Quebec, though temporarily residing in Ontario attending to his duties as a member of Parliament.

[Chambers, May 7, 1869.]

*O'Brien* shewed cause to a summons calling on the defendant, a judgment debtor, to shew cause why he should not be examined before the Judge of the County Court of the County of Carleton, under Con Stat. U. C. cap. 24, sec. 41. He filed an affidavit of the defendants' brother, from which it appeared that the usual place of residence of the defendant was at the City of Quebec, in the Province of Quebec, and beyond the jurisdiction of the Court, and that he now resides there; that the said defendant, has resided and had his domicile at the said City of Quebec all his life, and never resided or had his domicile elsewhere; that he came to Ottawa to attend to his Parliamentary duties as a member of the House of Commons of Canada for the Western Division of the City of Quebec, which he represents as a member of the said House of Commons, and that he returned to the said City of Quebec at the end of last week; that the defendant owns real estate in the City of Ottawa to the value of five thousand pounds, far more than sufficient to satisfy the claim of the plaintiff in this cause five times over, and that the plaintiff and his attorney are perfectly well aware of his owning such property, which is registered in his own name.

He contended, 1. That as the defendant did not reside within the jurisdiction of the court he could not be examined under the section referred to, nor could the order be enforced against him if he failed to attend, nor could he be punished for contempt in not attending.

2. That the defendant was privileged as a member of Parliament: *Reg v. Gamble & Boulton*, 9 U. C. Q. B. 546, and that now was the time to take the objection, and not upon any subsequent application to commit him for contempt in case he should fail to attend: see *Henderson v. Dickson*, 19 U. C. Q. B. 592.

*Henderson* supported the summons.

HAGARTY, C. J., C. P.—Refused to make an order for the examination of the defendant, on the ground that he did not reside within the jurisdiction of the Court within the meaning of the statute. He doubted whether the defendant had, as a member of Parliament, any such privilege as claimed on his behalf.

## WALKER v. DONOVAN.

*Law Reform Act, 1868, sec. 17, and schedule A.—Entry on issue.*

[Chambers, June 9, 1869.]

This was an action brought in the Common Pleas. The defendant desiring to bring it down to the County Court for trial, gave notice of trial for the same, making the entry required by the above act on the issue book alone.

*O'Brien*, for defendant, obtained a summons calling on plaintiff to show cause why the issue filed and served herein, and the notice of trial served herein, and all subsequent proceedings, should not be set aside for irregularity, in this, that the seventeenth section of the Law Reform Act, 1868, had not been complied with, by making an entry in the said issue filed and served, and said notice of trial and subsequent proceedings in words or to the effect in form A. in the schedule to said act.

Cause being shewn, it was contended that the word issue meant Issue Book, which did contain the notice required, and that the defendant had no defence on the merits.

*O'Brien* contra. The word "issue" means joinder of issue, and "entry" refers to an entry on record, and the notice should appear of record. The words "subsequent proceedings" must refer to other matters than the record merely.

ADAM WILSON, J.—I think the entry is sufficiently made by being made on the Issue Book in place of the *venire facias*. The summons must be discharged but without costs.

## APPEAL CASE.

THE MUNICIPALITY OF THE TOWN OF SIMCOE  
v. THE COUNTY OF NORFOLK.

*Assessment Act—Equalization of Municipalities for County purposes.*

*Held*, that the aggregate value of Municipalities to form the basis for the calculations for equalization for county purposes, under sub. sec. 2 of sec 71 of the Assessment Act, 82 Vic. cap. 36 is the value of the municipality as returned in the last revised Assessment Roll, and that it is not in the power of County Councils to vary such valuation.

[July 5th, 1869.]

WILSON, Co. J.—This is an appeal by the Town of Simcoe against the amount at which the aggregate assessment of the said Town was fixed by the County Council in the equalization of the different Townships and Towns of the County of Norfolk for County purposes, under section 71 (and sub-sections thereof), of cap. 36, Stats. of Ontario, 82 Vic., for the year 1869.

The County Council of Norfolk has equalized the Town of Simcoe at the sum of \$600,000 and then taken the interest on that amount at six per centum, thus making an aggregate valuation of the Town at \$360,000, while the assessor of the Town of Simcoe has returned the Roll of the said Town as finally revised at \$505,860. The Town Council contend, that the amount the Town is liable to be rated at, for County purposes, should be six per centum on the said sum of \$505,860, capitalized at ten per centum, which would give \$308,516 instead of \$360,000. The difference in dispute is therefore the sum of \$56,484, (say \$57,000 for convenience of calculation), which if



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taken from the aggregate valuation of the Town of Simcoe, must be added to the aggregate valuation of the Townships, or some of them, as the aggregate valuation of the whole County must not be reduced.

The Warden of the County, Daniel Matthews Esq., and Charles Robertson Esq., the Deputy Reeve of Windham, appear for the County Council, and Daniel Tisdale Esq., of the firm of Tisdale and Livingstone, appears for the Town of Simcoe.

The County Council admit, that the aggregate valuation of the Town, must be ascertained by six per centum interest on an aggregate valuation of the Town, capitalized at ten per centum, but contend that they, the County Council, have the right (under sec. 74 aforesaid) to fix such aggregate valuation of the Town, upon which the six per centum is to be calculated, and the ten per centum capitalized, instead of being bound by the amount "returned on the roll." They further contend, that even if wrong in this contention, the town of Simcoe must be assessed *this year*, for County purposes, on the equalization of last year; in other words, that the change of the law (if any in this respect) cannot be taken advantage of by the town of Simcoe, so as to avoid being assessed for County purposes this year, upon last year's equalization. They cite section 74 of said Act to support this argument. *Mr Tisdale*, on behalf of the town, contends that the County Council is bound by the amount returned on the Simcoe Roll, and that the interest at six per centum on that amount, capitalized at ten per centum, must be the aggregate valuation for the town, and that any other construction would render sub-section 2 of section 71 nugatory, and of no effect.

And further, as to this statute not applying to this year's assessment, *Mr Tisdale* also contends; that there is nothing in section 74, or any other section of the Act, to warrant a conclusion that the old Act is entirely repealed, and that all proceedings of the County Council must be under this statute.

The Warden produced a letter from the Hon. M. C. Cameron, expressing the opinion of that learned gentleman on the question; He (but under some doubt) is in favor of the position contended for by the town of Simcoe, but admits that his partner, Dr McMichael, entertains the opposite view, and states that the Council of York had also adopted that construction of the statute; that is, that the County Council may treat the capitalized value as *alterable*, instead of being bound to take the assessed value for the purpose of capitalization.

The 71st section of the Assessment Law of 1869 provides that the Council "may for the purpose of County rates increase or decrease the aggregate valuations, and adding or deducting so much per centum as may in their opinion be necessary to produce a just relation between all the valuations of real and personal estate in the county."

Then sub-section 2 of section 71 provides that, "In equalizing the rolls of Towns and Villages, the County Council shall take the interest of the amount returned on the rolls at six per centum, such capitalization shall be the aggregate valuation for such Towns and Villages for the purposes mentioned in the preceding section." The difficulty arises in determining what the pur-

poses in the preceding section are. For the purpose of County rates—the increase or decrease is to be made by section 71; if this is the only purpose referred to in sub-section 2, then the capitalized value cannot be altered; but if this capitalized value is the aggregate valuation for the purpose of ascertaining by comparison, whether it is a just valuation with respect to other municipalities, then of course this aggregate may be increased or decreased in the discretion of the County Council.

I can find no decisions upon this point, and must therefore rely entirely upon my own view of the statute. And after carefully considering it, I am of opinion that the contention of the town of Simcoe is correct, and that the County Council did not adopt the correct method in equalizing the roll of Simcoe. By reading section 71 and sub-section 2 thereof together, I can come to no other conclusion but that the County Council should, in equalizing the roll of Simcoe, have taken the interest at six per centum on the amount returned on the Roll, and capitalized the same at ten per centum. I think that the statute fixes such last-mentioned capitalization as the aggregate valuation for the Town, and that the County Council have no power to change it. It may, of course, be argued that this decision will enable assessors in towns and villages, by a low valuation, to give such Towns and Villages an undue advantage over Township Municipalities, but although I admit this, and see a necessity for further legislation upon this point, I am still of the opinion that my decision is in accordance with the true rendering of the Statute. I am also of opinion that the statute applies to the assessment for the present year, and that therefore the Town of Simcoe should only be equalized for County purposes for this year, on the sum of \$308,000 instead of \$360,000, and I therefore allow the appeal of the Town of Simcoe, and equalize their aggregate assessment for County purposes at the said sum of \$308,000: this leaves the total aggregate equalization of the County at the sum of \$57,000 less, and it devolves upon me, according to the provisions of the statute, to divide and add this sum to, or among, the several Townships of the County, or to some of them. In the absence of any evidence produced before me, and in the absence of any action of the County Council, it appears to me that my proper course is to divide and add the said sum of \$57,000 pro rata, according to their previous equalization by the County Council, among the several Townships of the said County, thus:—

Townships.	Equalization by County Council.	Added by Judge.	Total
Townsend .....	\$1,140,000	\$13,500	\$1,153,500
Windham .....	735,000	8,800	743,800
Middleton .....	360,000	4,400	364,400
Houghton .....	285,000	3,300	288,300
Walsingham .....	760,000	9,000	769,000
Charlottesville .....	704,000	8,800	708,800
Woodhouse .....	825,000	9,700	834,700
Town of Simcoe	360,000	.....	303,000
say .....			
Am't deduct'd by Judge .. 57,000	\$5,165,000	\$57,000	\$5,165,000
\$303,000			

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BOOTH V. CURTIS—MORTON V. WOODS.

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which I decide as the aggregate valuations of the said Town of Nimcoo and of the said Townships of the said County of Norfolk for the present year for County purposes.

## ENGLISH REPORTS.

### CHANCERY.

#### BOOTH V. CURTIS.

*Goodwill an incident of the premises, and not personal to the trader.*

[V. C. S., 17 W. R. 393]

Goodwill is sometimes, but incorrectly, viewed as something of a personal nature, appertaining to the person who carries on the business, and not to the premises where the business is carried on. So far as it consists in the connection to which the departing trader is able to introduce or recommend his successor, the former view is correct; but goodwill, properly speaking, is an incident of the premises, and inseparable from them, it being definable as the probability that customers who have before resorted to the shop will do so again, and presupposes the continued existence of the shop, so that by the removal of the shop the goodwill properly so called, is at an end. Thus, in the recent case of *King v. The Midland Railway Company*, 17 W. R. 118, the Vice-Chancellor Giffard held the mortgagee of a shop entitled to the price paid for the goodwill of the business where the shop had been sold to the railway company, on the ground that the mortgage included it as an incident of the premises; and in the case before us, where the lease of a freehold public house had been sold and a premium realised, the third of such premium was claimed by the widow of the intestate owner, as being in fact the consideration for the goodwill, and, therefore, personal estate. But the Vice-Chancellor Stuart held that the goodwill could not be separated from the fee simple, and was in other words an incident of it.

#### MORTON V. WOODS.

*Mortgage—Landlord and tenant—Tenancy at Will.*

[Ex. Ch., 17 W. R. 414.]

Two points of considerable importance were decided in this case. The plaintiffs having already mortgaged their land once, mortgaged it again to the defendants. The mortgage deed recited the fact of the first mortgage, and also provided that the plaintiffs were to become tenants to the defendants, at a specified rent for ten years, but that the defendants might at any time re-enter and determine the lease. This deed was executed by the plaintiffs, the mortgagors, but not by the defendants, the mortgagees, but the plaintiffs remained in possession. Subsequently, before any rent had been paid, the defendants distrained upon the plaintiffs for the agreed rent, and the plaintiffs raised the question whether there was any tenancy at all between the parties.

They contended that there was no tenancy, first, because the defendants had no legal estate at all in fact, or, as this appeared on the face of the deed, by estoppel either. Secondly, that as the intention of the deed was to create a term of

ten years, and, as this had not been carried out in consequence of the non-execution of the deed by the plaintiffs and as no rent had been paid there was nothing to shew that any tenancy at all had been created.

The doctrine of estoppel by deed, viz., that "no man shall be allowed to dispute his own solemn deed" (*Goddard v. Bailey*, Cowp. 601), is well known, and if a lessor purport to grant a lease, he is estopped from affirming as against his tenant that he had no legal estate to grant. There are several cases, however, which are often cited to prove that there is no estoppel when the real facts appear on the face of the deed, and in *Morton v. Woods*, reliance was placed on those cases as showing that the plaintiffs were not estopped from saying that there was no tenancy, as there was no legal estate in the plaintiffs out of which a tenancy could have been created, and as this appeared on the face of the mortgage deed. On this point judgment was given for the defendants, following *Jolly v. Arbutnot*, 7 W. R. 127, on the ground that there was an estoppel, and that the plaintiff, therefore, could not deny on this ground that they were tenants to the defendants.

The Court decided also in favour of the defendants that there was a tenancy which entitled them to distrain for the rent reserved. As no deed had been executed creating a term of ten years, it was clear that under 29 Car. 2. c. 3. and 8 & 9 Vic. c. 106, no such term existed, but the court were of opinion that there was a tenancy at will and at the amount of rent mentioned in the deed.

The decision of this latter point is not based upon any general proposition of law, that a tenancy at will is created at the agreed rent wherever there is an agreement for a tenancy for a certain time at a fixed rent and entry is made, but no actual tenancy is created on the agreed term for want of a deed under 8 & 9 Vic. c. 106. Such an inference from the judgment is expressly guarded against. The court say, "It is contended that as the parties intended to grant a lease for ten years, it is contrary to that intention to hold that an estate at will was created. That might, perhaps, be so in an ordinary case of a mere lease for years between landlord and tenant, but this instrument is a mortgage, and these further provisions which relate to the tenancy are all meant as a further security for the repayment of the interest, and the intention of the parties must be gathered from the whole instrument."

Although the application of this decision is thus restricted it will often be quoted, for a tenancy between mortgagor and mortgagee is often created by a mortgage deed. It is convenient for both parties, as it gives the mortgagor a right to the legal possession of the land as long as he pays the interest, and it also gives the mortgagee an additional security for the recovery of the interest by distress. *Morton v. Woods* will also be often cited on the other branch of the decision, as it adds the authority of a judgment of the court of Exchequer Chamber to the principle laid down in the Court of Chancery in *Jolly v. Arbutnot*.

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LLOYD V. LLOYD—CRAVEN V. SMITH.

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## LLOYD V. LLOYD.

*Will—Construction—"Property"—Real Estate.*

A testator specifically devised his real estate, and devised and bequeathed all his other property to his brother and nephew upon trust, to continue the same in its then state of investment, or to call it and invest the same in Government or real securities, and apply the income of his residuary estate as therein mentioned.

The testator became entitled to real estate other than that specifically devised after the date of his will.

*Held*, that such real estate passed by the devise of all his other property.

The court relied chiefly on the absence of the words "executors and administrators" in the gift to the trustees, and the use of the words "devise and bequeath" and "income of residuary estate."

[M. R. 17 W. R. 762]

Edward Lloyd, by his will dated in January, 1868, devised his house and lands in the parish of Naburn to his wife for life, and at her decease to his eldest daughter, Georgina, her heirs and assigns, or in the event of her dying before her mother without issue, to his second daughter Edith, her heirs and assigns; and bequeathed certain personal effects to his wife, and then proceeded thus: "I devise and bequeath all my other property whatsoever and wheresoever, to my brother the Reverend Yarburgh Gamaliel Lloyd, and my nephew Yarburgh George Lloyd upon trust, to continue the same in the investments on which it shall be standing at the time of my decease, or at their discretion to call in the same and invest it in their names on Government or real securities, or debentures of railways and municipal corporations, and to apply the same in manner following:—To set apart such a portion of the said residue, as with the sum of £300 a year settled on my said wife, will amount to one half of the total income arising from my residuary estate, and the said settled property united and to pay the interest of such sum to her during her natural life, and I bequeath the income of the remainder of my said residuary estate to my said two daughters, whom I commit to the care of their mother as their sole guardians. And I direct that my trustees shall pay to my said wife, and after her decease shall apply for their maintenance and education such part of their income as they shall think proper until they attain respectively the age of twenty-one years, or marry with their mother's consent, and that on respectively attaining that age or marrying as aforesaid, the said remaining trust fund shall be equally divided between them, and the sum reserved as aforesaid for their mother's life shall be divided in the same manner at her decease. Should I leave any other children, they shall take equal shares with their sisters in the furniture and property bequeathed to them."

The testator at the date of his will had no real estate, except the house and lands specifically bequeathed. Between the date of his will and his death, however, he became entitled to real estate of considerable extent and value.

On the death of the testator, his daughters, as his co-heiresses-at-law, claimed to be entitled to the residuary real estate, on the ground that he died intestate as to it, and this suit was accordingly instituted by them to obtain the opinion of the court as to the construction of the will.

*Sir R. Baggally*, Q. C., and *Brodrick*, for the plaintiffs, submitted that the residuary real estate did not pass by the gift of all his other property, the terms in which the limitations as to it were

declared being inconsistent with the testator having meant to include real estate: *Coard v. Holderness*, 8 W. R. 811, 20 Beav. 147.

*Jessel*, Q. C., and *Babington* for the testator's widow and executors.—We contend that the residuary real estate did pass. *Coard v. Holderness* goes very far. *Stokes v. Salomons*, 9 Ha. 75, contains almost every element in this case. The directions which are applicable only to personal estate, ought to be construed as referring only to such portions of the residuary estate as may consist of personalty, to which such directions may be applicable. As a general rule the residuary devise of "property" does pass real estate, especially when, as here, the testator has just made a specific devise of real estate, and may therefore be supposed to have had it in his mind: *Saumarez v. Saumarez*, 4 My. & Cr. 881; *Re Greenwich Hospital Improvement Act*, 20 Beav. 468.

*Sir R. Baggally* is reply.

*Lord Romilly*, M. R.—I think that the residuary gift here does pass the real estate. The testator begins by giving real estate specifically, then he devises and bequeaths all his other property whatsoever and wheresoever to trustees. It is true he does not devise it to them and their heirs, but then on the other hand he gives it to them *simpliciter*, and does not use the words executors and administrators, which weighed with me in deciding *Coard v. Holderness*. And then he speaks of the income arising from his residuary "estate." I think, therefore, that I must hold that the real estate does pass.

## CRAVEN V. SMITH.

*Costs—Slander—Damages under £10—30 & 31 Vic. c. 140 s. 5—Record before the Court.*

The fifth section of 30 & 31 Vic. c. 146, which enacts "that if in any action commenced after the passing of the Act in any of the superior courts the plaintiff shall recover a sum not exceeding ten pounds, if the action be founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at Chambers shall by rule or order allow such costs," applies to all actions, and the fact of the county court having concurrent jurisdiction in an action affords a *prima facie* presumption for granting a certificate for costs in such action.

The court will make use of its own records to inform itself of a matter which may not have been brought formally before it on affidavit.

[Ex. 17 W. R. 710.]

This was an action of slander, in which a verdict went by default for the plaintiff.

A writ of enquiry was executed on the 7th December, 1868, before Mr. Under-Sheriff Burchell, in the Sheriff's Court, Red Lion Square, and damages to the amount of £5 were awarded by the jury.

The Under-Sheriff was asked to certify for costs, but, under the belief that he had no such power, he refused, but expressed his opinion that, as a matter of right, the plaintiff was well entitled to costs, using these words, "I would certify if I could."

Application was made to Mr. Justice Blackburn at Chambers, to allow the plaintiff's costs, and on the learned judge's refusal, a rule to the following effect was obtained by *Anderson*: "that the defendant show cause why the plaintiff should

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not be entitled to his costs in this action, and why the master should not be at liberty to tax the same."

Against this rule *Francis* now showed cause.—In the first place, there are no sufficient affidavits before the court to inform it of the nature of this action. There is nothing to show that it is not an action which might have been tried in a county court. It has been before an officer of this court, and all that was laid before him ought to have been brought here on affidavit. In the second place, if the case of *Gray v. West*, 17 W. R. 479, L. R. 4 Q. B. 175, is pressed on me, I contend that that case has not decided that in all actions of slander a plaintiff is entitled to costs. The effect of it only comes to this, that the power of certifying for costs is confined to cases where the county court has concurrent jurisdiction. In *Gray v. West* the plaintiff had recovered much beyond what would have entitled her to costs in a superior court, under the general law applicable to actions of slander, but here all that is before the court is a bare statement that the jury awarded £5, and that the judge said "I would certify if I had the power." Section 84 of 28 & 24 Vic. c. 126, has been repealed, but section 5 of the present County Court Act carries out the intention more fully. The section applies to actions of slander, and the Legislature has there fixed £10 as a standard under which damages are not to carry costs, with a view of discountenancing trivial and frivolous actions.

*Anderson* in support of the rule, was not called upon by the court.

KELLY C B.—This rule must be made absolute. The first question which we have to determine is, whether we are at liberty to look at the record in order to judge of the nature of this action. The reasons suggested against our doing this are, firstly, that no affidavits on this point are before the Court; secondly, that the nature of the action is not alluded to in the rule. Now, I think that the Court is at all times at liberty to look at its own record. Our practice in making rules absolute for new trials, without requiring the record to be brought before us by affidavit, is analogous with and supports this view.

The second question is, whether we are called upon to look at what occurred before our brother Blackburn at Chambers, when he refused to make an order in this matter, and it is said that in consequence of his refusal the matter now comes before us as an appeal from his judgment. I am of opinion that we cannot without affidavits look to that which took place before the learned judge, and we must, therefore, in the present case, disregard entirely all that passed before him, and act in this matter as if no previous application had been made.

The third question we have to solve is, whether we are to allow the plaintiff in this action his costs. Now this was an action of slander as we learn from the record, and a very grave charge of felony was deliberately made by the defendant against the plaintiff. The jury by finding a substantial verdict of £5 marked the strong view they took of the case, and we have also the opinion of the Under-Sheriff, that the plaintiff was well entitled to costs, but he did not believe he had the power of granting them. Now I am of opinion that the Under-Sheriff clearly had the power

of certifying for the plaintiff's costs in this action although he supposed that he had not. The words "any action" used in the beginning of 30 & 31 Vic. c. 142, s. 5, certainly include an action of slander, an action which cannot be brought except in one of the superior courts, and for the trial of which a plaintiff must necessarily come here if he wishes to vindicate any aspersion on his character. I am, therefore, of opinion that this was a very proper case for a certificate of costs being granted by the judge who tried the case, but I go further and say that when any action such as the present is tried, an action which, if tried at all, must be tried in one of the superior courts, there is an imperative duty on the judge to certify unless some good cause to the contrary be shown. There is always a chance that the action may be of a nature that ought not to be tried at all, and in such case there would properly be a field for the exercise of the discretion of the judge.

BRAMWELL, B.—I am of the same opinion. This was an action for slander, and we have the slander stated. It is very forcible, and imputes a felony to the plaintiff. Section 5 includes an action of slander, and consequently where damages under £10 are awarded, the plaintiff gets no costs unless the judge who tries the case certifies for them, or they are allowed by the Court or a judge at Chambers. If this had been a primary application to us I should not have hesitated at all; and when I consider how bad the slander was, and that the jury awarded substantial damages I must come to the conclusion that the action was a right and proper one to bring; and from this it follows, as a logical consequence, that it is right and proper that the plaintiff should have his costs. Mr. Francis has ingeniously argued that by section 5 the Legislature meant to set a standard of £10, under which damages were not to carry costs, with a view of discountenancing trumpety actions, but I cannot agree with him. The meaning of the section is, that where the plaintiff gets less than £10 he must satisfy the judge that he has good reason for coming into a superior court where the County Court has jurisdiction; but where there is no concurrent jurisdiction—where an action, if brought at all, must be brought in a superior court, there is, I think, at once a *prima facie* case in favor of the certificate being granted, and the onus lies on the opposite party to disprove it. It is said that in reviewing this matter after it has been before my brother Blackburn, we are exercising an appellate jurisdiction, and that we ought, therefore, to have before us all the evidence that was then produced at Chambers before we can overrule his decision. Now I think we have quite as much as he had on which to come to a decision, and we have moreover, the reason of his decision, and that was, "that he never did grant such certificates." As to *Gray v. West*, that case is not only an authority for the present case, but it is even more than is wanted by the present plaintiff, for the judgment in that case seems to go so far as to say that a judge ought to certify in all cases of slander; I do not go so far as that, but I think that in this case as real damages have been awarded, as the action could not have been brought except in a superior court, and as it was one which it was quite pro-

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per to bring, we ought certainly to make this rule absolute.

PIGOTT, B.—I am of the same opinion. An action of slander is clearly within the meaning of section 5. Now comes the question, have we materials before us on which to form an opinion as to the nature of this action. I think we have, and they are furnished to us by the record. Both parties are at liberty to examine the record, so there can therefore be no surprise on either side. I cannot imagine that any injustice or inconvenience can arise from our making this use of it. And now having materials so furnished to us, we come to the affidavits. Without blindly following the Under-Sheriff, but looking at the slander as it is stated I concur in his opinion, and think that he was right when he said "that he would certify if he could." When my brother Blackburn refused to grant an order in this matter, all that I think he meant to say was, that before he granted such an order he would require strong proof of the reasonableness of bringing an action of this nature.

CLEASBY, B.—It must not be supposed that we are now deciding that the Court takes judicial notice of the record as of an Act of Parliament.

I find that in a rule in arrest of judgment, a rule grounded entirely on the record before the Court, the practice in the Queen's Bench and in this court differs from that pursued in the Common Pleas. The rule as there drawn up is, on "reading the record of nisi prius between the parties;" here and in the Queen's Bench these words are not used as if the record were constantly before the Court. I will say nothing on the other points, as I agree with the judgments of the Court.

*Rule made absolute.*

#### HUDSTON V. THE MIDLAND RAILWAY COMPANY.

##### *Railway company—Personal luggage—Carrier.*

A took a first-class return ticket by railway from N. to L. and back, subject to the following condition: "Luggage: first-class passengers are allowed 112 lbs. . . of personal luggage only (not being merchandise or other articles carried for hire or profit) free of charge." A. on his return journey brought with him on the railway a spring horse, which he had bought for the use of his children. The toy weighed 78 lbs., and was an improvement on the old "rocking-horse," being about forty-four inches in length and standing on a flat surface. The company refused to carry this toy unless a sum of 2s. 6d. was paid. A., under protest, paid the amount, and then brought an action in the county court. The learned judge decided in favour of the company, on the ground that the article in question was not personal luggage.

On appeal to this Court,

Held, that the judgment of the county court judge was right [Q. B., 17 W.R. 705.]

##### *Appeal from the County Court at Derby.*

The appellant sought to recover damages from the respondents in consequence of their refusing to carry a "spring horse" as and for his personal luggage.

On the hearing of the case before the county judge at Derby it was proved that the appellant (who was a stock-broker) on the 10th March, 1888, took a first-class return ticket from B. to E., near Nottingham, to King's-cross, and that he took no luggage with him, but while in London he bought, for the use of his children, a child's toy called a "spring horse," weighing 78 lbs. It was an improvement on the old rocking-horse,

being about forty-four inches in length, and standing on a flat surface. On the return journey, however, the respondents refused to allow the appellant to take this toy with him as his personal luggage, and demanded a charge of 2s. 6d. for its carriage. The appellant objected, but subsequently paid the charge under protest. On the railway ticket so issued and delivered to the appellant there was the following printed condition—"This ticket is issued subject to the regulations and conditions stated in the company's time-tables and bills."

The following were the regulations referred to in the foregoing condition so far as concerned the matter in question:

"Luggage: First-class passengers are allowed 112 lbs., second-class 100 lbs., and government passengers 56 lbs. of personal luggage only (not being merchandise or other articles carried for hire or profit) free of charge. All excess of luggage above the weight allowed will be charged for according to distance."

Before the learned judge at the County Court the appellant contended that according to the terms of the respondent's contract with him, as set forth on the railway ticket referred to, and in the time-tables and bills published by the respondents, he was entitled as a first-class passenger to take the "spring horse" in question with him, and have the same carried as his personal luggage free of charge, it being under the allowed weight and not within the restriction in the respondent's bills, "of merchandise or other articles carried for hire and profit." The respondents have a fixed tariff for excepted articles, but that tariff does not appear in their acts or public time-tables. The respondents contended that the spring horse did not come within the meaning of the words "personal luggage," inasmuch as it was not for his personal use and convenience as a traveller, but was an article for the carriage of which they were entitled to charge according to their usual custom and that of other specified railway companies.

On the 11th May the learned judge gave judgment for the respondents upon the ground that the horse in question was not such an article as a passenger would usually carry with him, but gave the appellant leave to appeal.

The question for the opinion of the Court is whether under the above circumstances the appellant was entitled to take with him the spring horse in question free of charge, or whether the respondents were entitled to charge for the carriage of the same.

*Macnaghten*, for the appellant.—The question is whether this toy is personal luggage. The Court will construe this regulation against the company and in favour of travellers. It must be taken that the company are cognizant of the habits and wants of travellers. The decided cases on that point show that it is impossible to draw a definite line, but the words personal luggage must be construed with reference to those things that are usually carried by travellers in each particular case; thus, sailors going to a seaport it is submitted may take their bedding, or the cricketer his cricket things, the fisherman his fishing tackle, or the sportsman his gun. The company here have used words of exclusion; they have therefore placed a meaning upon the

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words personal luggage—that is, articles which a traveller carries with him, not being merchandise nor for profit, is personal luggage. In *Phelps v. The London & North-Western Railway*, 13 W. R. 782, 34 L. J. C. P. 259, where an attorney took with him certain document and bank notes (which were held not to be personal luggage) for use in certain causes in a county court, Chief Justice Erie in his judgment says:—"But still the habits of mankind must be considered to be within the cognizance of the railway company, so that anything carried according to usage for personal use would be a matter for which the company would be responsible as luggage of a traveller on a journey." [LUSH, J.—No doubt personal luggage means more than what a passenger requires for his own personal use and convenience on a journey; the difficulty is to define what it does include.] A liberal construction, therefore, should be put upon the regulation, and will include different things at different times, according as the wants of travellers vary. For instance, if a family goes to a watering place the toys of the children may be taken as personal luggage. [HANNEN, J.—Should you say a four-post bed was personal luggage?] In *Cahill v. London and North-Western Railway Company*, 9 W. R. 658, 10 C. B. N. S. 154, the luggage consisted of merchandise; the same observation applies to *Belfast Railway Company v. Keys*, 9 W. R. 798, 9 Ho. of Lds. 556. He also cites *Angell on Carriers*, 8th ed. s. 115; *Story on Bailments*, 6th ed. s. 499.

*A. Wills* (J. C. Carter with him), for the respondents.—The court must look at the nature of the thing carried. This is in the nature of furniture; if this may be carried as personal luggage why may not a table, or chair, or bed. [LUSH, J.—What do you say to a bath?] Perhaps it might; but take the case of a person daily travelling to town on business; in this way he might furnish his house. He also relied on the cases cited on the other side, and the note to *Story on Bailments*, 6th ed. s. 499. This is not an article that is usually carried by travellers under ordinary circumstances; it was not for the traveller's personal use or convenience.

*Mucamara* in reply.—This is not furniture, but a child's toy. It is personal luggage if carried for the traveller's own use or for his family. The size of the article is immaterial, as it is within the weight allowed.

LUSH, J.—I am of opinion that the judgment of the county court judge must be affirmed. It must be taken that the company intended by their regulations to express the same thing as was expressed by their own Act of Parliament, although they have used a different phraseology. The regulation was that passengers should carry a certain weight of luggage, not being merchandise or other articles carried for hire or profit free of charge. Now it has been contended that the articles excluded by this rule are only those articles which are carried for hire or profit, and that if a thing is ordinarily carried by passengers, within the proper weight, such an article is personal luggage. I admit that it is extremely difficult to frame a definition which shall embrace all that is included within these words. I cannot say that I am satisfied with any definition yet given, but at all events the interpretation put on

these words by the respondents is too narrow—namely, that it embraces only those things that the traveller takes for his own personal use and convenience while travelling. I am not inclined to put so narrow a limit to the words. The words "ordinary luggage" mean something more than what a passenger wants for his own personal use and convenience. It describes a class of articles, and has reference to a description ordinarily and usually carried by passengers as their luggage. Taking this to be the meaning of the regulation it is intended to have regard to those things which are usually carried by them. The article in question goes beyond that limit. This was an article called a child's toy. It was a spring horse substituted for an improved rocking horse, 78 lbs. in weight and 44 inches in length, and cannot come within the meaning of a toy, which is something to be carried in the hand; nor that of personal luggage in the sense I have mentioned, namely, that description of luggage which passengers usually carry.

HANNEN, J., concurred.

HAYES, J.—I quite agree. I think the interpretation to be placed on these words must vary according as the habits and wants of travellers change. Pistols in America may be the ordinary luggage of travellers there, but at the present time they are not so here. It is said that this is a toy for a child, but it seems to me to be more like a horse; instead of the child carrying it, the horse is to carry the child. It would require a special carriage for it, a horse box in fact. The weight is quite exceptional, and without laying down any definition it is sufficient to say that this is within it.

*Judgment for respondents.*

YOUNG V. AUSTIN.

*Bill of exchange—Co-temporary agreement in writing—Demurrer.*

To an action on a bill of exchange by the drawer against the acceptor the defendant pleaded that he accepted the bill upon a certain condition—viz., that the plaintiff should renew the bill, if the defendant did not receive payment of certain moneys from C. before the bill became due.

*Held*, a good plea, and that it was not necessary to state in the plea that the condition was in writing. [C. P. 17 W. R. 706.]

The declaration was on a bill of exchange by the drawer, against the acceptor, payable to drawer two months after date.

*Plea*—The defendant says that he accepted the said bill upon a certain condition agreed upon between the plaintiff and defendant as part of the consideration for the said bill, viz., that the plaintiff should renew the said bill for a further term of two months beyond the date at which the said bill was payable, if, when the said bill became due, the defendant should not have received payment from the Corporation of the City of London of a certain sum of money then due to him as compensation, and the defendant accepted and delivered to the plaintiff, and the plaintiff received and always held the said bill upon and subject to the said condition, and at the time when the said bill became due, and at the time when this action was brought, the defendant had not received the said money and compensation, of all which the plaintiff had notice; and the defendant did all things necessary to entitle

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him to have the said bill renewed, according to the said agreement, yet the plaintiff did not renew the said bill; but wholly refused so to do, and commenced the action contrary to the terms of the said agreement and condition. Demurrer, and joinder in demurrer.

*Finlay*, in support of the demurrer.—As the contemporaneous agreement is not stated to be in writing the plea is bad on general demurrer: *Flight v. Gray*, 3 C. B. N. S. 320; *Kearns v. Durrell*, 6 C. B. 596; *Gillett v. Whitmarsh*, 8 Q. B. 966; *Abbott v. Hendricks*, 1 M. & G. 791; *Adams v. Wordley*, 1 M. & W. 374; *Forquet v. Moore*, 22 L. J. Ex. 85.

*Muckellar*, in support of the plea.—The bill was given as an escrow: *Byles on Bills*, 9th ed. p. 96; *Pym v. Campbell*, 4 W. R. 528, 6 El. & B. 370; *Wallis v. Little*, 10 W. R. 192; 2 *Taylor on Evidence*, ed. 1868, ss. 980, 1058, 1038; *Lindley v. Lacey*, 13 W. R. 80; *Bell v. Lord Ingestre*, 19 L. J. Q. B. 71; *Storey on Bills of Ex. edit. par. 289*, p. 242; *Foster v. Jolley*, 1 O. M. & R. 708. It is not necessary to state that the agreement was in writing: *Byles on Bills*, 9th ed. p. 97; *Salmon v. Webb*, 3 Ho. of Lds. 510; *The Thames Haven Dock & Railway Company v. Brymer*, 5 Ex. 696.

*Finlay*, in reply, cited 1 Wms. Saund. 276, n. 1 & 2, 211 B. n. i; *Stephenson Pleading*. 401. 4th ed; *Anon.* 1 Salk. 619; *Bullen on Pleading*. 288; *Case v. Barber*, Sir T. Raymond's Rep. 590; *Taylor v. Hillary*, 1 Gale Rep. 22; *Villiers v. Hanley*, 2 Wilson, 49.

BOVILL, C. J.—It has been stated that the bill must be treated as an escrow. There is nothing to show in the pleading that it ever was accepted as an escrow. It appears that there was a bill, which was accepted by the defendant, and that on the bill there was an absolute agreement to pay in two months. But at the time the bill was accepted there was an agreement entered into between the plaintiff and the defendant, that the plaintiff should renew the bill at the expiration of the two months for a further term of two months if the defendant should not receive payment of a certain sum of money from a third party. This is an action between immediate parties. There is no doubt a defendant may prove in such an action that there has been no consideration at all, or a total failure of consideration. There is no question of that sort here. The plea states nothing in that nature—it assumes that there has been a good consideration, but that the note was not to be paid on account of another agreement. The defendant is not at liberty to set up a contradictory parol agreement opposed to the express written contract stated in the bill; but it is clear that he is at liberty to set up another written agreement, in which the whole rights and liabilities of the parties are stated. That being so, the question arises, whether in a plea it is necessary to state that such an agreement was in writing. If the agreement is by parol, it is bad, and if it is written, it is good. It is stated in *Byles on Bills*, 9th ed. p. 97, "though it be necessary that the agreement affecting the operation of the bill should be in writing, it is not necessary to aver that it is in writing," and the rule is there correctly

laid down in the case of *Adams v. Wordley*, 1 M. & W. 374. There the objection was taken by special demurrer, but it was stated in argument that although that was the case, yet if there is a special demurrer any point could be taken advantage of—any point that could be raised by general demurrer. Special demurrers are done away with, and therefore the case only proves that such an objection was good on special demurrer. The case of *The Thames Haven Dock v. Brymer* was also cited. This was an action of covenant upon a deed against the assignees of B. by which B. agreed to sell, and the company to purchase, certain lands. In the declaration there was the averment that B. and his assignees were ready to have deduced a good title, but that the company discharged B. and the plaintiffs from so doing, and from the execution of a conveyance. It was contended on behalf of the company that this averment was insufficient, inasmuch as it is not shown that the discharge was by deed. This objection is not pointed out as a special cause of demurrer. It is conceded that the discharge would not be good unless it were by deed; but it is said that if the averment had been traversed it could not be proved otherwise than by production and proof of a deed, and so he contended that on general demurrer it must be taken to be by deed, the only way in which it can be good; and so it was decided in the Court of Exchequer. We think that the Court of Exchequer was right in holding the averment sufficient upon general demurrer. It is the same point in this case, and the rule laid down by *Byles, J.*, is correct. It was then argued that *Forquet v. Moore*, 22 L. J. Ex. 85, required that there should be an averment that the agreement was in writing: if not the plea was bad on general demurrer. This case was decided before the passing of the Common Law Procedure Act, 1852. Baron Parke only said that such a plea was demurrable, for not alleging the agreement to have been in writing; but it is questionable whether it might not have been good after verdict. He did not go on to say that it was bad on general demurrer, which the plaintiff here is required to show in order to make us decide that the plea is bad. There is no hardship done to the other side in deciding that it is not necessary to make the averment, for if at the trial it turns out that the agreement was not in writing he would not be able to give it in evidence of it.

KEATING, J.—The judgment must be for the defendant. The only point in the case is whether the want of the statement in the plea, that the agreement was in writing, makes the plea bad. The omission does not make the plea bad on general demurrer.

BRETT, J.—If the agreement stated in the plea was in writing, and made at the same time as the bill, it formed part of the same contract, and is therefore binding on the parties. The more proper course would have been to have stated in the plea that the agreement was in writing. It is not, however, a good objection to the plea now that special demurrers are done away with. Mr. Finlay omitted to show that such a plea had ever been held bad on general demurrer. Now that special demurrers are done

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away, and as we are not bound to say that such an objection is good on general demurrer, we will not do so.

*Judgment for the defendant.*

### POTTER V. RANKIN.

*Commission to take Evidence—Cost of Professional Assistance*  
[L. J. Nov. 23, 1868.]

This was a rule calling on the plaintiff to show cause why the master's taxation should not be reviewed, because he had, in taxing the costs as respects a commission to take evidence at Calcutta, refused to allow the expenses (on the defendant's side) of legal assistance to the Commissioners, who had employed attorneys to put the verbal questions for the plaintiff and the defendant.

The Court held that there was no absolute right to have such assistance, that it was a matter of discretion whether it was proper to allow it, that the master had exercised his discretion, and that as there was nothing to induce the Court to take a contrary view they would not interfere.

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### SUPREME COURT OF PENNSYLVANIA.

#### BAUM & Co. v. DILWORTH.

(*Pittsburgh Legal Journal.*)

Any alteration of a specialty by parole, makes the whole contract parole.

Where an action of assumpsit lies and the amount which the plaintiff seeks to recover appears by a writing under seal, such writing is admissible.

The question of the extension of a contract, is one of fact for the jury.

Error to the Court of Common Pleas of Allegheny County.

*Lucas for plaintiff in error.*

*Mellon contra.*

SHARPSWOOD, J.—The first error assigned is to the admission in evidence of the agreement of February 27, 1862. This agreement was under seal, and purported to be executed by one of the members of a firm. The action was assumpsit, and both in the original and the amended declaration the agreement in question was set out, not as the cause of action, but as inducement to a parole promise by the defendants to the plaintiff. Any alteration of a specialty by parole makes the whole contract parole; covenant cannot be maintained upon it; the terms of the specialty are in effect adopted, and become a part of the parole agreement: *Vicary v. Moore*, 2 Watts 451; *Vaughn v. Ferris*, 2 W. & S. 46. It follows *ex necessitate* that the agreement under seal was admissible, to be followed, as it was, by evidence of an extension or alteration by parole: *Charles v. Scott*, 1 S. & R. 294. Where an action of assumpsit lies, and the amount which the plaintiff seeks to recover appears by a writing under seal, said writing is admissible: *Mehaffy v. Shore*, 2 Penna. Rep. 861. If there was a new contract by parole within the scope of the partnership, which was a subsequent and distinct question in the cause, it mattered not whether the agreement as originally executed bound the firm or not.

The second error assigned is in admitting evidence of the price of timber in April, 1863. This was objected to, because the breach of the agreement occurred, if at all, as early as June 1, 1862; and that should therefore be the time at which the difference between the contract and the market price should be ascertained. But Graham Scott had testified that "during the spring of 1863, about April 1. Baum called at Dilworth's office. Plaintiff asked him what about the six rafts to fill out the contract. He stated he had them coming down, and would deliver them. Dilworth was satisfied with that. These six rafts were to be paid for, same as original contract, in four months from delivery." This certainly was evidence for the jury that there had been a parole alteration and extension of the original agreement, which was by its terms to be performed June 1, 1862. The mutual promises of the parties, the one to deliver and the other to accept and pay, were ample consideration to sustain it as a new contract. The learned judge would, therefore, have erred if he had ruled out this evidence.

The third error assigned is to the answer to the defendant's first point, "that the contract given in evidence in this case being executed by Baum alone, is not the covenant of John Carrier." It is unnecessary to consider whether the answer is right, as the point itself was immaterial and might have been declined. The answer did the plaintiff in error no injury. The learned judge himself, after expressing his opinion on the point presented, remarked that the suit was not on the contract under seal, but on a separate and distinct agreement by word of mouth by Baum, one of the firm, to deliver at a subsequent day the rafts which had not been delivered under the original contract, at the price therein agreed on. Whether that contract was binding as within the scope of the partnership business, was another and different question.

Neither can the fourth assignment of error be sustained. The contract declared on was not under seal, but parole, though it referred to and incorporated with it a sealed writing. The action of assumpsit could therefore be maintained.

The fifth assignment is to the instruction that the jury must find from the evidence when the time limited in the contract for delivery of the timber expired. This may be considered in connection with the sixth assignment, that there was error in submitting to the jury whether there had been an extension of the contract, without evidence. I have already referred to the testimony of Graham Scott, and to one of the objections made to this testimony that it showed no consideration. As to the remaining exception taken to it, that it did not refer to the timber included in the written agreement, but to another lot, that surely was a pure question of fact to be responded to by the jurors, and not by the court.

The seventh error is disposed of by what has already been said on the second, and the eighth was to the refusal of the court to answer a point as to the sufficiency of the declaration, which had clearly nothing to do with the trial of the issue: *Halderman v. Martin*, 10 Barr 369.

*Judgment affirmed.*



U. S. Rep.] FAWCETT v. BIGLEY—SCHNEIDER v. PROVIDENT LIFE INS. CO. [U. S. Rep.]

## FAWCETT v. BIGLEY.

(Pittsburgh Legal Journal.)

An agent's narrative of a past occurrence cannot be received as proof against the principal, of the existence of such occurrence.

*Mellon* for plaintiff in error.

*Achenon* contra.

Error to the District Court of Allegheny County.

AGNEW, J.—The offers to prove the declaration of John West, made after the accident, that it was caused by the omission of Bigley to furnish proper lines and assistance to secure the boats, was properly rejected. Clearly they were but the statements by West of a past transaction, and not declarations made in the course of Bigley's business, contemporaneous with and qualifying or explaining the acts in which he was engaged as the agent of Bigley. They came clearly within the rule that the narrative of an agent of a past occurrence cannot be received as proof, against the principal, of the existence of such occurrence: 1 Green's Ev., sec. 110; *Patton v. Minsinger*, 1 Casey 393; *Hannay v. Stewart*, 6 Watts 487.

If West knew the facts, he could be called to prove them. But after the accident he stood in antagonism to his employer. The boats were in his charge, and if they were lost by his negligence he might be held responsible by Bigley for the loss he had caused. It was now his interest to lay the fault at Bigley's door for not furnishing proper lines and help.

The error assigned to the rejection of the alleged rebutting evidence is not sustained. The plaintiff in error has furnished neither the declaration showing the nature of the alleged negligence, nor the evidence given by him under it. We are not in a situation to judge whether the evidence offered as rebutting was really so, or was only cumulative to that given in chief. We must therefore take the statement of the judge in the bill of exception as true that the plaintiff had gone fully into this part of his case in chief, and had called and examined this witness twice as well as many others, and that the evidence offered was not rebutting.

*Judgment affirmed.*

## SUPREME COURT OF WISCONSIN.

## EMMA SCHNEIDER v. THE PROVIDENT LIFE INSURANCE CO.

An "accident" within the meaning of a policy of insurance means an event which happens from some external violence or *vis major*, and which is unexpected, because it is from an unknown cause, or is an unusual result of a known cause.

Negligence of the person injured does not prevent it from being an accident.

Therefore in an action on a policy of insurance against accident, the negligence of the insured is no defence.

A policy of insurance against accident contained a clause against liability for injury resulting from the assured "wilfully and wantonly exposing himself to any unnecessary danger." The assured attempted to get on a train of cars while in slow motion, and fell and was killed.

Held, that the negligence was not wilful or wanton, and the company were liable.

This was an action on a policy, by which Bruno Schneider was insured against injury or death by accident. The policy contained a clause that the company should not be liable for any injury

happening to the assured by reason of his "wilfully and wantonly exposing himself to any unnecessary danger or peril."

The assured attempted to get on a train of cars after it had started, but was moving slowly, but fell and was killed. On the trial the plaintiff was nonsuited, on the ground that the evidence showed the case to be within the exception as to wilful exposure to danger.

The opinion of the court was delivered by

PAINE, J.—The position most strongly urged by the respondent's counsel in this court, was that inasmuch as the negligence of the deceased contributed to produce the injury, therefore the death was not occasioned by an accident at all, within the meaning of the policy. I cannot assent to this proposition. It would establish a limitation to the meaning of the word "accident" which has never been established either in law or in common understanding. A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured, which contributes to produce them. Thus men are injured by the careless use of firearms, of explosive substances, of machinery, the careless management of horses, and in a thousand ways, when it can readily be seen afterwards that a little greater care on their part would have prevented it. Yet such injuries having been unexpected and not caused intentionally or by design, are always called accidents, and properly so. Nothing is more common than items in the newspapers under the heading, "Accidents through carelessness."

There is nothing in the definition of the word that excludes the negligence of the assured party as one of the elements contributing to produce the result. An accident is defined as "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause; or is an unusual effect of a known cause, and therefore not expected."

An accident may happen from an unknown cause. But it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected to the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident.

It is true that accidents often happen from such kinds of negligence. But still it is equally true that they are not the usual result. If they were, people would cease to be guilty of such negligence. But cases in which accidents occur are very rare in comparison with the number in which there is the same negligence without any accident. A man draws his loaded gun toward him by the muzzle—the servant fills the lighted lamp with kerosene, a hundred times without injury. The next time the gun is discharged, or the lamp explodes. The result was unusual, and therefore unexpected. So there are undoubtedly thousands of persons who get on and off from cars in motion without accident, where one is injured. And therefore when an injury occurs it is an unusual result, and unexpected, and strictly an accident. There are not many authorities on the point. The respondent's counsel cites *Theobald v. The Railway Passengers' Assurance Co.*, 26 E. Law & Eq 432, not as a direct authority, but as containing an implication that

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the negligence of the injured party would prevent a recovery. I do not think it can be construed as conveying any such intimation. The insurance there was against a particular kind of accident; that was a railway accident, and the only question was, whether the injury was occasioned by an accident of that kind. The court held that it was, and although it mentions the fact that there was no negligence on the part of the assured, that cannot be considered as any intimation what would have been the effect of negligence if it had existed.

The general question as to what constituted an accident was considered in two subsequent cases in England. The first was *Sinclair v. The Maritime Passengers' Assurance Co.*, 8 El. & El. 478 (8 C. L. R. vol. 107), in which the question was, whether a sunstroke was an accident within the meaning of the policy. The court held that it was not, but was rather to be classed among diseases occasioned by natural causes, like exposure to malaria, &c., and while admitting the difficulty of giving a definition to the term accident which would be of universal application, they say they may safely assume "that some violence, casualty, or *vis major* is necessarily involved." There could be no question in this case that all these were involved.

In the subsequent case of *Trew v. Railway Passengers' Assurance Co.*, 6 Hurl. & Nor. 889, the question was, whether a death by drowning was accidental. The counsel relied on the language of the former case, and urged that there was no external force or violence. But the court held that if the death was occasioned by drowning, it was accidental within the meaning of the policy. And in answer to the argument of counsel they said: "If a man fell from a house-top, or overboard from a ship, and was killed; or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be, that policies of this kind, in many cases where death resulted from accident, would afford no protection whatever to the assured. We ought not to give to these policies a construction which will defeat the protection of the assured in a large class of cases."

There was no suggestion that there was any question to be made as to the negligence of the deceased, and yet the court said: "We think it ought to be submitted to the jury to say whether the deceased died from the action of the water, or natural causes. If they are of the opinion that he died from the action of the water, causing asphyxia, that is a death from external violence within the meaning of the policy, whether he swam to a distance and had not strength enough to regain the shore, or on going into the water got out of his depth."

Now either of these facts would seem to raise as strong an inference of negligence as an attempt to get upon cars in slow motion. Yet the court said that although the drowning was occasioned by either one of them, it would have been a death within the meaning of the policy, and the plaintiffs entitled to recover. I cannot conceive that it would have made such a remark except upon the assumption that the question, whether the injured party was guilty of negligence contributing to the accident, does not arise at all in this

class of cases. I think that is the true conclusion, both upon principle and authority, so far as there is any upon the subject; and the only questions are, first, whether the death or injury was occasioned by an accident within the general meaning of the policy, and if so, whether it was within any of the exceptions.

This conclusion is also very strongly supported by that provision of the policy under which the plaintiff was nonsuited. That necessarily implies that any degree of negligence falling short of "wilful and wanton exposure to unnecessary danger" would not prevent a recovery. Such a provision would be entirely superfluous and unmeaning in such a contract, if the observance of due care and skill on the part of the assured constituted an element to his right of action, as it does in actions for injuries occasioned by the negligence of the defendant.

The question therefore remains whether the attempt of the deceased to get upon the train was within this provision, and constituted a "wilful and wanton exposure of himself to unnecessary danger?" I cannot think so. The evidence showed that the train having once been to the platform, had backed so that the cars stood at some little distance from it; while it was waiting there the deceased was walking back and forth on the platform (of the depot). It is very probable that he expected the train to stop there again before finally leaving. But it did not. It came along, and while moving at a slow rate, or as fast as a man could walk, he attempted to get on and by some means fell either under or by the side of the cars and was crushed to death. The act may have been imprudent. It may have been such negligence as would have prevented a recovery in an action based upon the negligence of the company if there had been any. But it does not seem to have contained those elements which could be justly characterized as wilful or wanton. The deceased was in the regular prosecution of his business. He desired and expected to leave on that train. Finding that he would be left unless he got on while it was in motion, it was natural enough for him to make the attempt. The strong disinclination which people have to being left, would impel him to do so. The railroad employees were getting on at about the same time. Imprudent though it is, it is a common practice for others to get on and off in the same manner. He had undoubtedly seen it done, if he had not done it himself, many times without injury. I cannot regard it, therefore, as a wilful and wanton exposure of himself to unnecessary danger within the meaning of the policy.

The judgment is reversed, and a *venire de novo* awarded.—*American Law Register*.

## SUPREME COURT OF THE UNITED STATES.

WILLIAM WARD ET AL V. FRANCOIS L. SMITH.

The fact that an instrument is made payable at a bank does not make the bank an agent of payee to receive payment, unless he actually deposits the instrument there, or in some express manner authorizes the bank to act for him. When an instrument is lodged with a bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further, and without special authority an agent can only receive payment of the debt due his principal in the legal currency

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of the country, or in bills which pass as money at their par value by the common consent of the community. The doctrine that bank bills are a good tender unless objected to at the time, only applies to current bills which are redeemed at the counter of the bank, and pass at par value in business transactions in the place where offered. Payment of a check in the bills of a suspended bank, not known to the parties to be suspended, is not a satisfaction.

Where the debtor and the creditor's known agent to receive the money, reside in the same jurisdiction, the fact that the creditor is a citizen of a power at war with the debtor's government, and resident in the hostile state, does not absolve the debtor from his obligation to pay, and if he does not, he is liable for interest.

In error to the Circuit Court of the United States for the District of Maryland

In August 1860, the plaintiff in error, William Ward, purchased of Smith certain property in Virginia, and gave him for the consideration—money the three joint and several bonds of himself and co-defendant, upon which the present action was brought. These bonds, each for a sum exceeding four thousand dollars, bear date of the 22d of that month, payable, with interest, in six, twelve, and eighteen months after date, "at the office of discount and deposit of the Farmers' Bank of Virginia, at Alexandria."

In February 1861 the first bond was deposited at the bank designated for collection. At the time there was endorsed upon it a credit of over five hundred dollars; and it was admitted that subsequently the further sum of twenty-five hundred dollars was received by Smith, and that the amount of certain taxes on the estate purchased, paid by Ward, was to be deducted.

In May 1861, Smith left Alexandria, and remained within the Confederate military lines during the continuance of the civil war. He took with him the other two bonds, which were never deposited at the Farmers' Bank for collection. Whilst he was thus absent from Alexandria, Ward deposited with the bank to his credit, at different times between June 1861 and April 1862, various sums in notes of different banks of Virginia, the nominal amount of which exceeded by several thousand dollars the balance due on the first bond. These notes were at a discount at the times they were deposited, varying from eleven to twenty-three per cent. The cashier of the bank endorsed the several sums thus received as credits on the first bond; but he testifies that he made the endorsement without the knowledge or request of the plaintiff. It was not until June 1865 that the plaintiff Smith was informed of the deposits to his credit, and he at once refused to sanction the transaction and accept the deposits, and gave notice to the cashier of the bank and the defendants of his refusal. The cashier thereupon erased the indorsements made by him on the bond.

The defendants (plaintiffs in error) claimed that they were entitled to have the amounts thus deposited and endorsed credited to them on the bonds, and allowed as a set-off to the demand of the plaintiff. They made this claim upon these grounds: That by the provision in the bonds, making them payable at the Farmers' Bank, in Alexandria, the parties contracted that the bonds should be deposited there for collection either before or at maturity; that the bank was thereby constituted—whether the instruments were or were not deposited with it—the agent of the plaintiff for their collection; and that as such

agent it could receive in payment equally with gold and silver the notes of any banks, whether circulating at par or below par, and discharge the obligors.

*A. G. Browns and F. W. Brune*, for plaintiffs in error.

*R. J. & J. L. Brent*, for defendants in error.

**FIELD, J.** [after reciting the facts.—It is undoubtedly true that the designation of the place of payment in the bonds imported a stipulation that their holder should have them at the bank when due to receive payment, and that the obligors would produce there the funds to pay them. It was inserted for the mutual convenience of the parties. And it is the general usage in such cases for the holder of the instrument to lodge it with the bank for collection, and the party bound for its payment can call there and take it up. If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay. When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. In the case at bar, only one bond was deposited with the Farmers' Bank. That institution, therefore, was only agent of the payee for its collection. It had no authority to receive payment of the other bonds for him or on his account. Whatever it may have received from the obligors to be applied on the other bonds, it received as their agent, not as the agent of the obligee. If the notes have depreciated since in its possession, the loss must be adjusted between the bank and the depositors; it cannot fall upon the holder of the bonds.

But even as agent of the payee of the first bond, the bank was not authorised to receive in its payment depreciated notes of the banks of Virginia. The fact that these notes constituted the principal currency in which the ordinary transactions of business were conducted in Alexandria, cannot alter the law. The notes were not a legal tender for the debt, nor could they have been sold for the amount due in legal currency. The doctrine that bank bills are a good tender unless objected to at the time, on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. Notes not thus current at their par value, nor redeemable on presentation, are not a good tender to principal or agent, whether they are objected to at the time or not.

In *Ontario Bank v. Lightbody*, 18 Wend. 105, it was held that the payment of a check in the bills of a bank which had previously suspended was not a satisfaction of the debt, though the suspension was unknown by either of the parties, and the bill was current at the time, the court observing that the bills of banks could only be

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considered and treated as money so long as they are redeemed by the bank in specie.

That the power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities. The only condition they impose upon the principal is, that he shall inform the debtor that he refuses to sanction the unauthorized transaction of his agent within a reasonable period after it is brought to his knowledge: *Story on Prom. Notes*, §§ 115, 389; *Graydon v. Patterson*, 18 Iowa 256; *Ward v. Evans*, 2 L.I. Rayn. 930; *Howard v. Chapman*, 4 Carr. & Payne 508.

The objection that the bond did not draw interest pending the civil war is not tenable. The defendant, Ward, who purchased the land, was the principal debtor, and he resided within the lines of the Union forces, and the bonds were there payable. It is not necessary to consider here whether the rule that interest is not recoverable on debts between alien enemies during war of their respective countries, is applicable to debts between citizens of states in rebellion and citizens of states adhering to the National Government in the late civil war. That rule can only apply when the money is to be paid to the belligerent directly. When an agent appointed to receive the money resides within the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and, of course, the interest which it bears. It does not follow that the agent, if he receives the money, will violate the law by remitting it to his alien principal. "The rule," says Mr. Justice WASHINGTON, in *Conn v. Penn*, 1 Peters C. C. R. 496, "can never apply in cases where a creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could in no respect be construed into a violation of the duties imposed by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal. If he should do so, the offence is imputable to him, and not to the person paying him the money;" *Denniston v. Imbrie*, 4 Wash. C. C. 895. Nor can the rule apply when one of several joint debtors resides within the same country with the creditor, or with the known agent of the creditor. It was so held in *Paul v. Christie*, 4 Harris & McHenry's Rep. 167.

Here the principal debtor resided, and the agent of the creditor for the collection of the first bond was situated within the Federal lines and jurisdiction. No rule respecting intercourse with the enemy could apply as between Marberry, the cashier of the bank at Alexandria, and Ward, the principal debtor residing at the same place.

The principal debtor being within the Union lines, could have protected himself against the running of interest on the other two bonds, by attending on their maturity at the bank, where they were made payable, with the funds necessary to pay them. If the creditor within the Confederate lines had not in that event an agent

present to receive payment and surrender the bonds, he would have lost the right to claim subsequent interest.

*Judgment affirmed.*

## SUPREME COURT OF PENNSYLVANIA.

### MAGILL V. MAGILL.

Rules of Court cannot be suffered to become instrumentalities to defeat the rights of suitors. Where a respondent in her answer to a libel in divorce, through haste and surprise and the rapid movements of libellant, failed to claim an issue to try the facts denied therein, as she should have done, under the 80th rule of the Court of Common Pleas, but within eleven days thereafter she applied to the court for leave to amend her answer in that respect, in view of the fact that the amendment, if allowed, would not have delayed the final result, it should have been granted.

Appeal from the Common Pleas of Allegheny County.

THOMPSON, C. J.—Rules are indispensable aids in the routine business of courts, and to this only they properly apply. Being subject to the authority which gives them existence, they are administered in subordination to the rights and equities of suitors. In other words, they are not to be instrumentalities to defeat those rights; but their provisions are always adhered to when, in any neglect of them, rights have accrued which it would be inequitable or unjust to disturb. Where, however, a failure to comply with their requirements in any given case, is the result of mistake, haste, or surprise, and positive injury is likely to ensue to a party, courts will not adhere to them simply on account of the rule, at the expense of justice and the just rights of parties. Hence amendments to fulfil requirements, are generally allowed, when offered without unreasonable delay, and before much expense and costs have accrued.—*Pittsburgh Leal Journal*.

## ORPHAN'S COURT.

### ESTATE OF L. COATES STOCKTON.

(Legal Gazette.)

1. The action of assumpsit for use and occupation is not a common law remedy, but under the Statute, 2 Geo. II. cap. 13, sec. 14, it lies whenever one man holds possession of the real estate of another under an agreement expressed or implied.
2. The action may be sustained by a sheriff's vendee against the tenant in possession at the time of the sale, and the damages will be measured by the value of the use of the land between the time of the acknowledgment of the deed and the removal of the tenant.

In the matter of the Estate of L. Coates Stockton, deceased.

Sur exceptions to Auditor's report.

Opinion by BRAXSTON, J., delivered July 3, 1869.

The deceased was, in his lifetime, tenant of the premises, No. 216 Market Street, under a lease executed by George W. Conrad. There was a mortgage on the property, prior in date to the lease. Suit was brought upon the mortgage, judgment obtained, and the premises sold to George A. Twibill, October 5, 1863. The purchaser obtained his deed from the Sheriff March 7, 1864. Shortly thereafter he served a notice upon the tenant to quit, with which the tenant

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completed June 6, 1864. He subsequently died; and upon the settlement of the administrator's account, Mr. Twibill claimed, "for use and occupation of the premises from the date of the sheriff's sale, October 5th, 1863, to the day of the removal, June 6th, 1864." The auditor disallowed the demand, the claimant excepted, and the sole question, therefore, for our consideration is whether a sheriff's vendee, who notifies the tenant to quit, can thereafter claim for the occupation of the land up to the date of the removal?

Ordinarily it would seem to be strange that a man should be permitted to occupy land admitted to be the property of another without making the owner some compensation. It would also appear to be remarkable if the owner of land could not—as can many other parties—waive the tort and sue in assumpsit. It must be conceded that Mr. Twibill could have maintained ejectment and recovered mesne profits. And if so, why should he not be permitted to abandon the fiction of force, and sue upon the implication to pay for what was taken, which would prevail against him who spoiled the freehold of a load of coal or a bushel of apples? It is familiar law, that the tort may be waived and assumpsit brought for the value of goods obtained by fraud. *Hill v. Perrott*, 3 Taunt. 278; *Edwards v. Newman*, 1 B. & C. 418; 2 D. & R. 568. For goods tortiously taken, *Brewer v. Sparrow*, 7 B. & C. 810. For tolls improperly exacted, *Waterhouse v. Keen*, 4 B. & C. 211. For moneys obtained by detention of deeds, *Pratt v. Vizard*, 5 Barn. & Ad. 808. For moneys obtained by fraud or duress, *Buller's Nisi Prius*, 182. And by illegal seizure and distress, see cases cited 1 Stephens' Nisi Prius, 843.

The difficulty of applying these principles to the action for use and occupation is that this remedy seems to have been unknown to the common law. Assumpsit for use and occupation is the creature of the statute, 2 Geo. II., c. 19, sec. 14, by which it is enacted that "it shall and may be lawful to and for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands \* \* \* held \* \* \* by the defendant in an action on the case for use and occupation."

As the act of Parliament speaks of "agreement not by deed," it has been held that assignees of a bankrupt tenant, entering upon their own motion, were not liable for the balance of the year's rent. *Naish v. Tailock*, 2 H. B. 320. Other cases to the same effect are cited by Gibson, C. J., in *Mackey v. Robinson*, 2 Jones, 172.

From these authorities it would seem to be very clear that the statute only gives the remedy where there is an agreement. But this agreement need not be express—it may be implied. Thus use and occupation lies where the tenant holds over. 8 Stephens' N. P. 2718. And we are told that to support the action the plaintiff must prove,

1st. An occupation by the defendant.

2nd. That such occupation was by permission; *Ibid*, 2718; and that "the action only lies where there is an actual contract, either express or implied."

As to this implication of contract Mr. Stephens further tells us that "The terms of the statute may seem in strictness only to include the cases in which the relation of landlord and tenant exists. But the Courts have given a wide and liberal construction to it; and it now appears to be settled that wherever one party occupies by the permission of another, although no agreement for such occupation was in contemplation between the parties, the fact of the one having occupied by the sufferance of the other is sufficient to raise an implied assumpsit by the other to pay for his occupation." *Ibid* 2721.

In the case before us the sheriff's vendee could have brought his ejectment the day after he received his deed. He permitted the tenant to occupy the premises for three months. This, in the language of the authority quoted, raised an implied assumpsit by the tenant to pay for the occupation; and the exception is therefore sustained, unless there is something to be found in the Pennsylvania cases to which we have been referred requiring us to rule otherwise.

In *Potts v. Leacher*, 1 Yeates 576, it was simply held that a "contract, express or implied, must be proved." The Court intimates that proof of coming into possession by permission of the plaintiff would raise the implication.

*Bank v. Ege*, 9 Watts, 486, is also relied on as decisive against the claim. The plaintiff there, after giving the three months' notice, (and thus disaffirming the lease,) claimed rent under the lease. The Supreme Court simply decided, that as the landlord had repudiated the agreement, he could claim nothing under it. So, too, in *Hemphill v. Tevis*, 4 W. & S. 585, the sheriff's vendee gave the notice to quit, and yet claimed rent under the lease which he had thus formally disaffirmed. I say under the lease, for, although the reporter states that it was "assumpsit for use and occupation," the Court put the case, in their opinion, upon the distinction between such an action—which they decided could be brought—and a suit upon the lease, which they declared could not be maintained. Judge Sergeant, referring to *Bank v. Ege*, (already cited,) and to the notice given by Mr. Tevis, says:

"The tie thus broken could not be knitted together again by the defendant's remaining in possession, or any act short of a mutual contract between the parties for a new lease. The defendant's not surrendering the possession (if such were the case), did not have that effect, however it might operate as to the claim for use and occupation founded on possession. We think the lease was at an end by the notice, and that the purchaser could not afterwards sustain an action founded upon the contract to recover rent. If the defendants are liable at all it can only be for use and occupation, or on some other ground than the contract."

*Mackey v. Robinson*, 1 Jones, 170, simply decided that an owner could not maintain an action on a lease to which he was not a party. Chief Justice Gibson admits, that use and occupation will lie where the defendant has held by the plaintiff's permission.

It will thus be seen, that no one of the cases relied on by the accountant, is at all conclusion against this claim. On the contrary, they all

## GENERAL CORRESPONDENCE.

support Mr. Stephens' statement, that mere permission or sufferance raises the implied assumption. Indeed it is difficult to understand why there should be a distinction between this and many other kindred cases familiar to the student. The law presumes a promise to pay the man who saws wood, or does any work for another, upon simple command, or indeed, by bare permission. The person who uses the goods of another is supposed to have promised to pay what they are reasonably worth. What distinction should there be between land and merchandise, the title and circumstances being all admitted?

Accordingly we find Mr. Justice Lowrie saying, in *Bettinger v. Baker*, 5 Casey, 69. "If at the time of the acknowledgment of the sheriff's deed there be a lessee in possession, \* \* sec. 119 makes him the tenant of the purchaser on the terms of his lease; and if the lease is of later date than the lien on which the sale is made, \* sec. 105, requires him to give up the possession within three months after the purchaser shall choose to give him notice to do so; and to pay the purchaser all the rent, or the value of the use of the land," &c. This law makes the lessee under a lease of later date than the lien, a tenant at will of the purchaser.

In *Brolaskey v. Ferguson*, 12 Wr. 484, it was held, that there must be a priority of contract—but it was added "that the proof may be either direct or presumptive." And in *Hayden v. Patterson*, 1 P. F. Smith, 255, M. Justice Agnew says: "Wherever the owner himself could maintain an action for use and occupation, undoubtedly the same remedy lies in favor of the purchaser of his title at sheriff's sale," &c.

We do not regard the provisions of the Act of June 16, 1836, Br. Dig. 450, as interfering with the claim, for the special remedy, or the recovery of damages for detention of the premises can only be invoked where the "person in possession" shall refuse \* \* to comply with the notice to quit." Indeed the complainant must swear that the person is in possession "at the time of the application" to the justice. That was impossible in this case, for the tenant had complied with the notice; and it is plain that the law referred to can never be invoked where the occupier moves away the last day of the three months.

It would seem to be contrary to all equity that he should not pay for what he has thus enjoyed. We do not, however, see that the claim can extend back prior to the acknowledgment of the deed. The Act says that the purchaser may "after the acknowledgment of the deed," give notice; and to that date his claim would seem to be limited by *Bank v. Wise*, 8 Watts, 894; *Braddees v. Wiley*, 8 Watts, 862, *Borrell v. Dewert*, 1. Wr. 188; *Hayden v. Patterson*, 1 P. F. Smith, 255.

Subject to this modification of the claim, the exception is sustained.

## GENERAL CORRESPONDENCE.

## TO THE EDITORS OF THE LAW JOURNAL.

Gentlemen,—I have to request an answer in your next issue to the following case:—

"A. B." laid an information before a J. P. against "C. D." for using grossly insulting language to him "A. B." on the public street contrary to a By-law of the town.

"A. B. proved his case but did not prove the By-law. Defendant "C. D." called one witness and then took objection that the By-law had not been proven. The magistrate held that by calling the witness it left it optional with him to insist on proof of the By-law, or not, and that he could legally convict without such proof. What is your opinion?

LEX.

[There can be no two opinions it seems to us in respect to the case submitted by "Lex." The proof of the By-law was an essential part of the plaintiff's case. We think the magistrate was wrong if he proceeded to convict without such proof.—Eds. L. J.]

*Parties practising Law without being duly admitted, and representing to the public that they are Barristers and Attorneys.*

## TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—There are several gentlemen within our County, who represent to the public that they are barristers, attorneys and solicitors, and by so doing, they seem to be doing quite a lucrative business; it has been much spoken of amongst the profession that a stop should be put to it, some are of opinion that it cannot be done, others that it can, and now I beg that you will give your opinion in your next issue.

The mode of proceeding is as follows, viz.: the unfortunate client wishes to have an appearance entered or may wish an action brought, he comes to one of the above gentlemen, who says that he is a lawyer, and who receives his retainer and what fees he can get when the machinery is set to work. This is done by an attorney in the county town allowing his name to be used, and attending to the agency business, on the understanding that the portion allotted to him are agency fees, the county town attorney in the proceedings is certainly the attorney in the proceedings, but

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virtually he is the agent of one of the above named gentlemen, and a cloak in a good many respects for him, and a cheat on those who are duly qualified to practice the law.

This I certainly think is prevented by the Consolidated Statutes of U. C., cap. 35, sec. 1. These persons are also in the habit of receiving fees under the representation aforesaid for their opinions, and in fact to my own knowledge from municipalities.

LEX.

Clinton, July, 13, 1869.

[We think the case put by our correspondent is expressly provided for by sec. 17 of the Attorneys' Act, cap. 85 Con. Stat. U. C. and that the attorneys who assist such unqualified persons in the practices mentioned, would certainly be liable to the penalties therein set out.—Eds. L. J.]

## REVIEWS.

## THE CANADIAN PARLIAMENTARY COMPANION.

Edited by Henry J. Morgan, author of the *Bibliotheca Canadensis*, &c. Fifth Edition. Montreal: Printed by the Montreal Printing and Publishing Company. 1869.

We have to thank the editor for a copy of the new edition of this well-known and now well-established publication. The fifth edition is an enlarged and improved one. It contains in five parts all such information as one would expect to find in a work of the kind, either in reference to the Parliament of the Dominion or to the Local Governments or Legislatures. The work opens with a list of the Queen's Privy Council of Canada. Then we have a short biography of Sir John Young, the Governor of the Dominion, and of each of his staff. Next we have each of the Deputy Heads and chief officers of the Departments laid before us in a panoramic form, showing all that each has done and suffered for the good of his country. This is followed by a short sketch, giving the legal qualifications of senators and members of the House of Commons. All this is introductory matter. Part I. of the work then opens with a biographical sketch of each member of the Senate, prefaced by a short account of the venerable Clerk, and concludes with a note of the changes in the Senate since the last edition of the work. This part of the work, though embracing biographies of seventy-two senators,

is condensed within thirty-six pages. Part II. gives an explanation of certain Parliamentary terms and proceedings, and embraces twenty-four pages. Part III., which is devoted to the House of Commons, opens with a short sketch of the well-known and popular Clerk, expands in a series of biographies of the 181 members of the collected wisdom, and, having exhausted 75 pages of the work, concludes with a note of the changes in the membership of the House since the last edition. Part IV. is devoted to the Local Governments and Legislatures of Ontario, Quebec, Nova Scotia, and New Brunswick, and hands down to posterity all connected with the Local Governments and Legislatures in appropriate language. This part of the work occupies eighty pages. Mr. Morgan, the editor, by the publication of this and similar works, is doing good service to his fellow-men, and is doing much to mark his day and generation in the great stream of time. It is to be hoped that he reaps some rewards of a substantial kind as fruits of his industry. It is well that his name should live after him, but it is very desirable that his body should not be in the meantime neglected. Man cannot live by fame alone. That kind of fame which gives to the famous a little of this world's dross "on account," though earthy, is often convenient, and sometimes necessary.

PARLIAMENTARY GOVERNMENT IN ENGLAND, ITS ORIGIN, DEVELOPMENT, AND PRACTICAL OPERATION. Edited by Alpheus Todd, Esq., Librarian of the House of Commons of Canada. London: Longman, Green & Co. 1869.

We have received the second volume of this valuable work, and had intended to have reviewed it in this number; but, considering the importance of the work, and the pressure of other calls on our time, we did not like to give it a "slipshod notice," and so have deferred our review of it till our next issue.

Lord Eldon, when he was handsome Jack Scott of the Northern Circuit, was about to make a short cut over the sands from Ulverstone to Lancaster at the flow of the tide, when he was restrained from acting on his rash resolve by the representations of an hotel-keeper. "Danger, danger," asked Scott, impatiently; "have you ever lost anybody there?" Mine host answered slowly, "Nae, sir, naebody has been lost on the sands, the *puir bodies* have been found at low water."

—*Jefferson*.

## THE PRESS IMPRESSED.

## DIARY FOR AUGUST.

1. SUN. 10th Sunday after Trinity. Lammas.
8. SUN. 11th Sunday after Trinity.
14. Sat... Last day for County Clerks to certify County rates to Municipalities in Counties.
15. SUN. 12th Sunday after Trinity.
18. Wed. Last day for setting down and giving notice for re-hearing.
21. Sat... Long Vacation ends.
22. SUN. 13th Sunday after Trinity.
24. Tue... St. Bartholomew.
26. Thur. Re-hearing Term in Chancery begins.
29. SUN. 14th Sunday after Trinity.
30. Wed. County of York Term begins.

THE

## Canada Law Journal.

AUGUST, 1869.

## THE PRESS IMPRESSED.

Much is said in praise of the liberty of the Press, and much good has resulted from the freedom which in modern times the Press has enjoyed. But it is not to be forgotten that the liberty of the Press is no more than the liberty of the moral agent who controls it. That which a man has no right to do in a state of society as an individual, he has no right to do because in some way connected with the Press. The Press is subject to the law which binds society together, and whenever it transgresses the law with impunity, the liberty to do right becomes a license to do wrong.

We have been led to make these observations owing to the habit of some newspaper writers in Canada to discuss proceedings pending for decision in courts of justice—a habit which, if our judges were not beyond suspicion, would be most destructive in its influence, and which, even under existing circumstances, ought to be generally discouraged. When a case has been argued and is awaiting judgment, no suitor or other person has any right to approach the judicial mind in order to influence its conclusion. That which is wrong in the suitor is wrong in the newspaper editor. And yet it is not unusual in Canada to find newspapers conducted with considerable ability, abusing parties to legal proceedings, or their witnesses, and attempting to hector the judges towards a particular conclusion. Such conduct is very reprehensible, and in England would not be permitted for a day. While in general proud of our Press,

we cannot help stating that conduct such as we have indicated is a foul blot on its otherwise fair escutcheon.

One newspaper of considerable ability in Toronto, of late deemed it necessary to provide its readers with an article on the case of Dr. Allen, on his application to rescind the order for the delivery of his children to the mother, which article was published between the day of the argument and the day for the delivery of judgment. It freely espoused one side of the case that was argued, and roughly commented upon anything that appeared in the case opposed to the views of the writer. No notice was taken of this indecorum, and the writer emboldened by the success of his former effort, deemed it necessary to produce another article in the same case between the day of the argument of the application for process of contempt against the Doctor and the day of the delivery of judgment. The latter article in referring to the affidavit made by a son of the Doctor used this language, "The thing is so monstrous that it is, for the ends of justice, to be hoped there may be no hesitation in at once meting him out his proper reward." While so dealing with one of the witnesses before the judge, it is not to be wondered that language equally unwarranted was used in reference to the conduct of the Doctor himself, which was described as "an attempt to trifle with and defy the majesty of the court." Again: "one can hardly conceive a more gross attempt, or one more apparently ridiculous, to trifle with the court, &c." Considering that the conduct of the Doctor, whether a contempt or not, was the subject of investigation, "one can hardly conceive a more gross attempt, or one more apparently ridiculous, to trifle with the court," than this same newspaper article. It is with pain that we direct attention to it. The writer of it little knew that while endeavouring to prejudice the judge and the public against the Doctor, who was accused of contempt of court, that he, the writer, was guilty of a most gross contempt, and one for which, without doubt or question, he ought to be severely punished. Nothing can be more pernicious than to prejudice the minds of the public against persons concerned as parties in causes before the causes are finally determined. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed



## THE PRESS IMPRESSED.

with safety both to themselves and to their characters; and that judges, whether weak or strong, may be allowed equally to discharge their duties without the fear of offending popular writers or popular newspaper publishers.

Such was, in effect, the language of the the celebrated Lord Chancellor Hardwicke, nearly a century since (see 1 Salk., 469), and such is in effect, the language of many eminent judges of more recent times. The present Lord Chancellor, when Vice-Chancellor Wood adjudged the publisher of the *Pall Mall Gazette* guilty of a gross contempt of court, for thus commenting upon affidavits filed in a suit, "many of these are important enough if the deponents can endure cross-examination in the witness box; many are obviously false, absurd and worthless:" *Tichborne v. Tichborne*, 17 L. T. N. S. 5. Still later, Vice-Chancellor Malins was equally mindful of the duty which he owed to himself, to the bench, and to the public, by subjecting the proprietor of a local newspaper to costs for animadverting upon the parties to a winding up petition then before the court, and intimated that if process of contempt were asked he would most certainly have granted it: *Re The Cheltenham and Swansea Railway Carriage and Waggon Company, limited*, 20 L. T. N. S. 169. In doing so he said, "whenever it happens that a newspaper, whether on its own motion or at the instigation of others, publishes proceedings in a cause, it does prejudice the cause of justice." Motions of this kind are of late very frequent in England. Vice-Chancellor Malins, in the last reported case of the kind, *Robson v. Dodds*, 20 L. T. N. S. 941, said that three or four had occurred before him in a recent period. This learned judge, while alive to the great benefits of a free Press, is no less alive to the necessity of a pure administration of justice. He, in the case to which we have last referred, made an order for the committal of a newspaper publisher who had published an article which was calculated to create a prejudice against one of the parties to a pending suit, and to cast opprobrium upon his solicitor. It is true that he spoke of motions of the kind as of a very embarrassing character, but his firmness in disposing of them is deserving of all praise. No one better appreciates the mission of the Press than this learned judge, but no one less shrinks from the discharge of his duty when it becomes his

duty to censure the Press. He is reported in the last mentioned case to have used this manly language, "on the one hand, it is of the highest importance to the public that the Press should be as much as possible unrestricted, a freedom which gives life and vigour to newspaper articles; and it is equally clear that no such comments should be permitted as are calculated to impede the course of justice." Vice-Chancellor James still more recently held a Court near Guildford at which the printer and publisher of a local paper, called the *Poole Pilot*, was called upon to show cause why he should not be committed for contempt of Court for having published an article vindicating in strong terms the claims of a party to a suit pending in Court as to the Tichborne title and estates. Dr. Tristram appeared for the newspaper publisher, and put in an affidavit expressing the deep regret of the publisher for having published the article. The learned counsel by way of excusing his client, said that the strong remarks against the present claimant, which had appeared in other newspapers, had led his client to believe that he had a right to comment on the case. The Vice-Chancellor said, that the press "has no right to comment upon or interfere with a pending suit," that a gross contempt of court had been committed, and at first he was strongly inclined to send the newspaper publisher to prison, but as the latter had expressed his regret he, the learned Vice-Chancellor, would order him to pay the costs of the application. The Vice-Chancellor further intimated, that "in all future cases the full punitive power vested in the Court would be exercised" (*The Law Times*, August 21, 1869, p. 316).

It is to be hoped that we have sufficiently directed attention to the abuse of which we complain, in order to prevent a repetition of it. Most of our newspaper writers are not only men of ability but men of good sense. With such men it is not necessary to do more than point out a legal transgression, in order to remove it. They fearlessly point out what they conceive to be wrong in the conduct of others, and must not complain if others ask them to take "the beam out of their own eye." The misconduct of which we complain is not, we are sure, wilful. It is rather the result of ignorance of the rules of law that govern the conduct of newspaper

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writers in relation to pending proceedings in courts of justice. But good sense and good taste alike point it out as an abuse, and while the many discern the abuse, we trust the few who have hitherto acted as if blind to it, will in future discern it, and act accordingly. If not, the courts must be invoked to maintain the majesty of the law. Public opinion is deeply interested in the pure administration of justice, and will abundantly sustain any effort necessary in the direction we have indicated; and the public, in the interest of the laws of decency and propriety, may be compelled ere long to ask if in Canada we have judges of such an independent spirit and unswerving purpose as Lord Hardwicke, Lord Hatherly, or the present Vice-Chancellors, Malins or James.

## SELECTIONS.

## REAL PROPERTY LAW REFORM—THE RULE IN SHELLEY'S CASE.

The present generation can scarcely realise the fact that there was once a time when the opinion of a Lord Chief Justice upon an abstruse question of conveyancing law would be the talk of the town for weeks. Law reform is now so much the order of the day that abolitions, remodellings, and simplifications have long ceased to surprise anyone. Since the days when an opinion of Lord Mansfield set all the lawyers by the ears in two factions of Shelleyites and anti-Shelleyites, besides drawing down on the great judge the fierce denunciations of Junius, who accused him of wanting to overthrow the laws of England, there has happened a grand turn of the tide. The reforms made are so many indications of the direction in which the current runs. A very few generations of lawyers have passed away since the tendency was all for form and technicality, and "valuable forensic inventions;"—whether in consequence of the accumulations of the previous cycle having become unbearable, or from ever recurrent reaction and oscillation, it is now all for clearing up and cutting down. This is apparent both in legislative reforms and in the tone of judicial decisions, and the tendency shows to the greatest advantage in the latter.

We are going to concern ourselves just now with the particular section of law just alluded to. "The rule in *Shelley's case*;"—"that when the ancestor, by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or tail, the word 'heirs' is a word of limitation of the estate of the ancestor," who takes

the whole fee—is one of the first bits of law which most law students learn; it is eminently adapted to be learnt by rote without being comprehended. It is, as Mr. Joshua Williams points out, obviously of far more ancient date than the case, *temp. Elizabeth*, with which it is identified. We do not propose to discuss its origin in this place, beyond pointing out that it is a very natural sequence from the incapacity of alienating which attached to the freeholder of old times. When the tenant could neither sell nor devise, a gift to A. for life with remainder to his heirs would, in practical effect, amount to the same as a gift to A. in fee, or rather, a gift to A. in fee would confer no greater freedom on A.; and it was not strange that the former limitation should be always represented by its shorter equivalent.

As the power of alienation arose, the expressions ceased to be synonymous, but in the meantime the synonyme had become a fixed legal doctrine. It is perhaps the principal evidence of the inconvenience of this technical rule or doctrine (for great lawyers have differed as to which of the two it should be styled) that a large volume may be written upon it without exhausting the subject, and what is worse, without leaving its effect clearly ascertained. Now the rule itself is as much a rule of law as the rule of the descent of real estate *ab intestato*: given an estate of freehold to the ancestor, and it is a rule of law that the same gift cannot make his "heirs" *purchasers* of the reversion in fee. Where they take by descent, that is tantamount to the ancestor taking the fee at once, and the power of alienation attached to an estate in fee thus enables the ancestor to frustrate the testator's intention. Whether or not a particular gift comes within the rule is a question of construction.

Baron Srebutter, in his stroll round the limbo of departed lawyers and litigants, is made to say—"My attention was arrested by a miserable looking ghost, surrounded by books and papers, which, with a bewildered countenance, he was vainly endeavouring to read through. Upon inquiry I found that this was the shade of the celebrated Shelley, who, for some misdeeds committed upon earth, had been sentenced to read and understand all the decisions and books relating to the celebrated rule laid down in his own case." "The mind sinks," said Lord Eldon, "beneath the multitude of cases" (*Jesson v. Wright*, 2 Bligh, 1).

Shortly, we may take the result to be as follows:—

Where the words "heirs" or "heirs of the body" are used, the ancestor takes the fee, even though the testator has added words of distribution (e.g., "share and share alike") or an ulterior limitation to the heirs of the second generation, or other expressions inconsistent with the notion of the ancestor's taking more than a life interest. The words "issue" (and in some cases even "children") have the like effect, but not quite so strongly, it

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having been held by the Court of Queen's Bench in a late case of *Bradley v. Cartwright*, L. R. 2 C. P. 511, that words of distribution may by implication control the words "issue" so as to limit the ancestor's estate to a life interest.\* And whatever be the words employed, even if the phrase be "heirs," a downright explanation by the testator that he meant sons or daughters will prevent the Rule from operating. If the testator has not been his own conveyancer, but has created an executory trust to settle lands on limitations sounding like that in the Rule, the Courts, in directing the settlement, incline to give effect to any indication of an intention that the first taker should not take more than a life interest.

The Rule itself has very often been stigmatised as a pitfall for testators, frustrating their intentions by giving the absolute disposal to persons intended only to enjoy for life, and thus enabling such persons to deprive the ultimate beneficiaries of their share in the testator's bounty. The testator may have meant that A. should only enjoy for his life, and that the reversion should be a provision for his children or some one else. If, however, the gift comes within the Rule in *Shelley's case*, A gets the fee simple or becomes tenant in tail, as the case may be, and can at once sell every atom, and so destroy all the hopes of all who were to come after him. We have lately received a pamphlet written by Mr. W. Wiley, one of the Registrars of the Principal Registry of the Irish Probate Court, in which a very earnest appeal is made for the Legislature to abolish the rule. In the words of Cockburn, C. J., in *Jordan v. Adams* (9 C. B. N. S. 497), Mr. Wiley urges that "it despotically fixes on the testator a purpose which he never entertains, and enforces a construction by which it is as clear as the sun at noon-day that his intention is violated."

He then classifies as follows the instances in which the Rule defeats intention by converting the life interest which the testator meant to give, into an estate tail:—

- "1. Cases where after a life estate given to the parent or ancestor, followed by a devise to the 'heirs of the body,' words of limitation are added to the words 'heirs of the body,' which would be totally unnecessary if it was intended that the parent or ancestor should get an estate tail.
2. Cases where after the words 'heirs of the body' words of distribution are added, totally inconsistent with the devolution of an estate tail.
3. Cases where, after an estate for life is given to the parent, there is a devise to his 'issue,' and words of limitation are added, which would be wholly unnecessary if an estate tail was intended.

4. Cases where words of distribution are added to the word 'issue,' totally inconsistent with the devolution of an estate tail.

5. Cases where the words 'child,' 'son,' and 'daughter' have been held to be words of limitation conferring an estate tail."

We agree with Mr. Wiley that the Rule in *Shelley's case* is a grievance; but he has rather overstated its amount. The rule is not necessarily bad because it defeats the intention of testators. No rules oftener defeat testator's intentions than the rule against perpetuity and the law which permits a tenant in tail to bar the entail and sell the land. Probably a majority of testators would like, if they could do so, to tie up their property longer than the law allows them: some of them try to do so, and fail, at the expense of intestacy; but it would not be well on that account to abolish or even remodel the rule against perpetuity. Undoubtedly the Rule in *Shelley's case* must frequently disappoint the intention when the will has been drawn by the testator himself or some other layman. Precisely the same again may be said of the rule against perpetuity, and that objection amounts to this, that as long as there are rules of law they will bruise those who do not know them oftener than those who do. When our real property law is simplified, as we hope to see it one day simplified, to the utmost possible degree, there will still remain some things which to inexperts will be technicalities. And for this simple reason, that the ownership of land must ever be a matter of title rather than of possession. It may sound illiberal, but we do not think "unlearned testators" who draw their own wills are entitled to very much pity. It is common, whenever a doubt arises about the effect of a will, to place it to the account of the "glorious uncertainty of the law." In many cases the doubt arises simply from the testator's want of forethought, or his imperfect style of putting his wishes on paper. Events—births, deaths, or what not—may occur which never occurred to the testator at all. Or he may use words with a certain meaning in his own mind, without reflecting that the next person who saw them might read them in a totally different sense.\* In the first case he really has expressed no intention respecting the devolution in the events which have taken place; in the second, it is hard to say what is meant; but in either case the Court endeavours, if possible, to get at his mind. And however the law may be simplified, an expert acting on instructions will always make a better will than a testator could do for himself, just as an architect will design him a better house.

After all is said, there remains this,—the Rule is technical, there is no longer any reason

\* The Wills Act, by restricting the meaning of the words "die without issue," though leaving them to the old law where they follow an estate tail, somewhat narrowed the operation of the Rule.

\* We remember a devise to A. (a relation of testator's), and after him to "the heirs female," in which it was utterly impossible to determine whether the testator meant A.'s heirs or his own.

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for it, and it has therefore become a purely arbitrary rule; it disappoints intentions, it leads to litigation, and has no counteracting advantage,—and Mr. Wiley is quite right in saying that it should be abolished. As to the mode in which the abolition should be effected, we differ from him again. He enumerates seven rules by which he desires that the property should be preserved for the descendants, allowing the ancestor to take a life estate only. Six of these are derived from the five instances above-mentioned; the seventh is designed to assist the practical working of the alteration, by providing that where distributive interests are given, “the tenant for life should have the power of selling the fee under proper restriction, the money to be produced, deducting the value of his life interest, to be settled on the trusts of the will.” A better plan would be simply in a short Act to abolish the Rule in *Shelley's case* at once, either by name or description. The testator's indications of intention would then have free scope for operation, without the confusion and difficulty of interpretation which would inevitably arise from substituting six or seven benevolent rules for one harsh one. But if even if this were done there would be this evil, that the authorities would be thrown into a far more troublesome state than at present. There would be hundreds of decided cases of which it would be almost impossible to say whether they had any effect left them or not.

We are firmly convinced in our own mind that the time has now arrived when a careful hand should remodel our whole real property law by abolishing all that has become purely arbitrary. In effect this would probably be to remove almost every trace of feudalism. Such a change *will* be made, and we should prefer to see it made once for all, rather than piecemeal.—*Solicitors' Journal*.

## CONTEMPT OF COURT.

This is a subject to which attention must have been drawn by several cases which have been lately reported. Whether the occurrence of conduct which the Court deems contemptuous has been more frequent, or the reporters have been more diligent in reporting such cases as have occurred, we know not.

It will be conceived that every court of justice possesses an inherent right, which it is in duty bound to exercise, of punishing those who contemn its dignity; and it is quite clear that if the right did not exist, the course of justice would be seriously interfered with. This being so, the question follows, what are the acts which courts of justice, and especially the court of Chancery, are wont to consider as contemptuous?

The sort of contempt which consists in using violence or abusive language to a person serving the process or orders of the Court, or using scandalous or contemptuous words against the Court or the process thereof, Cons. Ord. xlii.

2, needs no more than a passing notice. When we read that in *Williams v. Johns*, 12 Feb., 1773, the defendant, on being served with the *subpoena*, compelled the person who served it to eat the parchment and wax of the process, and then beat and kicked him, and left him for dead, with orders to his servants to throw the body into the river, one is not surprised to find that the defendant was sent to the Fleet for contempt, under the above-mentioned order.

But we pass on to the commoner forms of contempt at the present day, which consist in words rather than in deeds. Of these, according to Lord Hardwicke, there are three sorts,

The first consists in scandalising the court itself; the second in libelling parties who are concerned in proceedings before the court; and the third in prejudicing mankind against persons concerned in proceedings before the Court, whether parties or not, at any time before the proceedings are finally disposed of.

With reference to the first sort of contempt, it is clear that anything that scandalises the Court itself, whether in the nature of personal insult, or of reflection upon the course of procedure, or the administration of justice, must be a contempt of the grossest character, *Lechmere Charlton's case*, 2 My. & Cr. 316, where the contempt was in writing a threatening letter to the master to influence his judgment in the matter of the Ludlow charities, and *Martin's case*, 2 R. & M. 674 n, where the contempt was in writing a letter to the Lord Chancellor enclosing money, are the first instances which occur to us. But cases like these are not common.

The second and third sorts may be taken together, and stated to consist in publishing written or printed matter concerning pending proceedings, either with the intention of vilifying the parties concerned, or of prejudicing mankind against them. It is obvious that many cases of this character are cases of libel dealt with in a particular way because they amount to a contempt of court; while, on the other hand, there are many cases where something has been done, and the Court is moved to commit the party doing it for contempt, instead of to restrain him by injunction from doing so again.

The reason of this is that the Court is bound to assert its dignity and protect parties before it no less than itself, in order to secure the due administration of justice. “Nothing is more incumbent upon courts of justice,” Lord Hardwicke said, in *Roach v. Garvan*, “than to preserve these proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned, whether parties or not, in causes, before the cause is finally heard.”

The case which led to these remarks of Lord Hardwicke is better known as the *St. James's Chronicle case* (2 Atk. 470). It was a motion in the cause of *Roach v. Garvan* to commit the printers of that journal and the *Champion*,

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another journal. Their offence consisted in publishing a narrative of the facts involved in the cause before the cause was finally heard, in the course of which they took upon themselves to abuse some of the parties, and call persons who had given evidence by the opprobrious epithet of "affidavit men."

In *Ex parte Jones* (13 Ves. 237) Lork Erskine committed, for contempt of court, the committee of a lunatic, and the committee's wife who had published a pamphlet, with an address by way of dedication to the Lord High Chancellor, reflecting on the conduct of the petitioners, who were persons interested in the lunatic's affairs. This, be it observed, was under the jurisdiction in lunacy.

In *Colman v. West Hartlepool Railway Company* (8 W. R. 734), a party was restrained from publishing a garbled account of certain proceedings before the Court which was calculated to damage the case of his opponents. We refer to this case, which was not one of contempt, because it illustrates what we were saying, that it is pretty much at the option of the offended party to move to restrain the publication or to move to commit for having published.

In *Mrs. Farley's case* (2 Ves. Sen. 20), sometimes cited as *Cann v. Cann* (2 Dick. 3 Ha. 338n.), the contempt consisted in publishing advertisements in *Felix Farley's Bristol Journal*, relating to the answer of Sir Robert Cann in the cause.

In the *Tichborne case* (15 W. R. 1072), the printer of the *Pall Mall Gazette* was held to have committed a technical contempt by an article commenting on the affidavits filed on behalf of the plaintiff in a cause which had not come before the Court. And in *Felkin v. Herbert* (12 W. R. 241), it was held by Vice-Chancellor Kindersley that the publication of an article in a newspaper holding up to ignominy witnesses who have made affidavits, and reflecting on the parties to the suit, is a gross contempt, even though the time for evidence, as regards the party on whose behalf the affidavits are made, has closed. And the case of *Dav v. Eley* (17 W. R. 245), must not be omitted, where the Master of the Rolls held that the solicitor to a defendant in the suit was liable to be committed for contempt in having sent anonymous letters to a newspaper stating as facts the matters relied on by his client, which were in fact the points which would have to be tried as issues in the cause. So, too, in *Matthews v. Smith* (3 Ha. 381), it was held to be a contempt to publish advertisements with reference to the subject-matter of the suit, calculated to prejudice the rights or misrepresent the relative positions or character of any of the parties to the cause, or witnesses in it.

In *Robson v. Dodds* (1) (17 W. R. 782), Vice-Chancellor Malins held that the printer of a local newspaper was guilty of contempt in having published comments on the conduct

of a gentleman who had been solicitor of a building society, pending the hearing of a suit instituted by him against the society. And attacks on witnesses were held to be a contempt in *Littler v. Thomson* (2 Beav. 130).

We may infer that would be equally a contempt of court to publish comments on the conduct of parties engaged in the conduct of a cause with a view to prejudice the success of the cause, or misrepresent its objects.

It appears then, that it is equally a contempt of court whether the person on whom the attack is made be a party to the suit or not. Witnesses, equally with parties, are entitled to the protection of the Court, if not more so. Every party to a suit has some inducement to sustain the incidental annoyances of litigation; but the mere witness, who in nine cases out of ten thinks it a great hardship to get into the witness box, or attend before the examiner, would be still less likely to come forward and give evidence if his motives, his character, and his truthfulness could be made a jest of with impunity. Hence it is that the liberty of the press, in the few cases where it has run into licence in this respect, has uniformly been restrained. No doubt the question of intention has something to do with the assessment of the penalty; but where a contempt of this nature has been committed it is no justification that it was not intended to commit a contempt (*Felkin v. Herbert, ubi sup.*).

So much for comments on and notices and advertisements concerning pending proceedings. There is yet another form of contempt of court arising out of the publication of the pleadings themselves, or any portion of them, pending the final hearing of the cause. It is equally certain that this may constitute a contempt, even where there are no comments on the portion of the pleadings or documents so published. There are two reasons why this should be so; first, because such a publication invites the world to pass judgment on a case where the Court has not expressed its own opinion; and secondly, because *ex parte* statements have a tendency to bias the mind of the judge and jury. It may be idle, as was argued in *Felkin v. Herbert*, to suppose a publication would affect the decision of the Court, even were it read by the judge himself; but the question is one of tendency, and not of fact. A Captain Perry, it was said by Lord Hardwicke in *Roach v. Garvan*, printed his brief before the cause came on, thus prejudicing the world beforehand, and we cannot but presume that it was held to be a contempt. In *Re Cheltenham and Swansea Waggon Company*, 17 W. R. 463, the contempt consisted in publishing in the columns of a newspaper, but without comment, a petition to wind up a company that had been filed, but not answered, containing charges of fraud, &c. It was argued that the contents of a petition were public matter, as it was necessarily advertised, and copies were supplied under certain restrictions; but it was held that it differed not in this respect from a

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bill, the publication of which would clearly be a contempt.

Much, however, depends on the intention, which is necessarily inferred from the facts of the case. In *Baker v. Hart*, 2 Atk. 488, the parties interested in an order for a receiver had published it with a statement of the facts upon which the order was obtained, and circulated copies of it among the tenants of the estate. This they did under the master's advice, and it was held not to be a contempt, though the Court disapproved of what had been done. *Brook v. Evans*, 8 W. R. 688, may be referred to on this point.

The subject is a well-worn one, yet it is singular how often a risk of contempt is incurred, most commonly at the present day by journalists in the exercise of what are called their public duties. With every desire to see the press retain its present position and continue to exercise its functions as well as it does at the present day, it must be admitted that the interests of justice require some reticence as to the proceedings before the Courts, and that the parties to these proceedings, and the witnesses and persons engaged in the conduct of these proceedings, should be protected from comment or remark, either of an *ex parte* character, or of an adverse or depreciatory tendency. The safest way to avoid the risk is to omit indulging the public with such comments or remarks altogether until the verdict is given or the decree made.

The order to commit will rarely be executed, as an apology will, in most cases be made. *Felkin v. Herbert*, however, shows that it is not enough to come to the Court and say, "If I have technically committed a contempt, I apologise," but the apology must be unqualified. Hence, when the order that the party do stand committed is made, the practice is to direct that such order be not enforced for a limited period, in order to give room for a proper apology to be offered.—*Solicitor's Journal*.

## CAPITAL PUNISHMENT.

The advocates of capital punishment abolition sustained on Wednesday last their customary defeat, and as long as these reformers aim at abolishing capital punishment *in toto* it may be anticipated, and must certainly be desired, that their measure will always meet a similar fate. Last year the defeat took place on a motion made by Mr. Gilpin (the introducer of this year's measure), during the passage of the Capital Punishment within Prisons Bill. On that occasion, Mr. John Stuart Mill argued very forcibly against the abolition, founding his argument on the deterrent effect of capital punishment upon the criminal classes.

The arguments adduced last week did not comprise any addition to those which have been adduced on previous occasions. A large portion of the argument employed usually consists in the recapitulation of particular in-

stances of hardship, real or assumed; here, of course, the instances selected vary from year to year; but, with this exception, there is no novelty.

The position of the abolitionists consists partly in a sort of assumed rule of progress. Capital punishment, they say, has been abolished from time to time for the minor offences, and the result has justified the abolition; hanging for murder now remains the sole remnant of a bygone system; in obedience to the irresistible march of improvement it is time that this too were swept away. If it were an established law that alterations must always proceed in the same direction, that there is no resting place at which reformers can say, "hold, enough," politicians and political economists of the obstructive and antediluvian school would have a very heavy weight thrown in their favor. We should fear to redress even the grossest abuses from dread of committing ourselves to a ceaseless progress which might end by landing us at an extreme ten times more grievous than its opposite. That we abolished hanging for sheep stealing, and, as we believe, with good effect, is no reason why we should do away with hanging for murder. The position starts with a *petitio principii*, that it is expedient to abolish—which is precisely what has never yet been shown.

The question is purely one of expediency, but before discussing what is the real gist of it, the question of deterrent effect, we may notice an argument generally urged, and which was urged last week by Mr. Gilpin, that capital punishment is irrevocable. If you condemn a man to imprisonment for life, and it is afterwards proved that he was innocent, you can release him; but you cannot restore him to life if you have had him executed. This is a drawback, a disadvantage attendant on the infliction of death as a punishment. But it is far from being so weighty as the abolitionists seem to fancy. In the first place, it is a drawback which, in a greater or less degree, according to the severity of the punishment, coupled with the sensitiveness of the recipient, applies to all penalties. In no case can you do more than remit the infliction to come; you cannot recall the past. If you have sentenced the convict to ten years' penal servitude, you can remit the nine years to come, but you cannot recall the one year which he has endured, any more than you can compensate him for the shame and the pain of the exposure, the trial, and the unjust conviction. We have never heard it advanced as an argument against flogging garotters, that if a conviction for garrotting proves unjust, you cannot unflog the innocent convict. The number of innocent convicts for capital offence is so infinitesimally small that there can be no ground for altering the system on their account.

There is also urged another argument proceeding somewhat in the opposite direction to this. It is said that in consequence of death

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being the penalty for murder as now defined by the law, many criminals escape altogether, because the juries will not inflict death for certain offences: *exempli gratia*, infanticide. The case of infanticide is a peculiar one. It is perhaps scarcely desirable to make any distinction which would amount to enacting that the life of a child is not as valuable as that of an adult. At the same time infanticide proper, that is, the murder of a child at the birth, is certainly considered not so heinous an offence as the murder of an older person, as is shewn by the readiness of juries to acquit in such cases. The rule of law that murder can only be committed of a child completely born and severed from his mother has prevented vast numbers of convictions which otherwise must have taken place, but where mortal injury is inflicted on a child in this position the guilt is really quite as great as if the child had been completely born and the violence inflicted immediately afterwards. It would in our opinion be a great improvement of the law to enact that upon any charge of infanticide—that is, of murder by a mother of her child at the time of its birth—it should not be necessary to prove that the child was completely born at the time of the infliction of the injury, but that in all such cases the offence should not be capital, but punishable only with penal servitude. If that change were made, convictions would take place of the serious charge in cases where at present their is only a conviction for concealing the birth, an offence of a totally different character.

It is also said that there is much uncertainty in the infliction, in consequence of the Home Secretary's intervention. The jurisdiction of the Home Secretary as to remitting sentences is of course, unsatisfactory, but it is difficult to see how it can be done away with altogether. There must always be in some quarter a discretion as to the exercise of the prerogative of mercy. But the cases in which the Home Secretary is appealed to may be divided into two classes, those in which he is called upon to pass judgment upon the facts proved at the trial, and those where new facts are brought forward. As to the latter there clearly ought to be a means of ordering a new trial. We have protested several times against allowing a universal right of appeal in criminal cases, but it would be much more desirable that the subsequent investigation, which must take place in certain cases, should be a judicial rather than a private one. The former class of cases are more difficult to deal with. We are inclined to think it would be an improvement to refer the question of the remission to a certain number of the judges, say five or six, of whom the judge who tried the case should be one. By this plan there would be more uniformity than at present.

The present defects in the system of capital punishment call for amendment, but are not an argument for abolition.

It is also said, and with apparent serious-

ness, "But capital punishment cannot operate as a deterrent, for see how many murders are committed." This argument might be advanced against the infliction of any punishment whatever. But another question occurs at once: Is there any likelihood that if we abolished hanging there would be fewer murders? It was stated in last year's debate that in the experience of Tuscany and Switzerland the abolition was followed by a marked increase of crime. It requires no unusual penetration to see that, if hanging for murder were abolished, lesser crimes would be consummated by murder far oftener than at present. Where a ruffian has committed a brutal rape or robbery, which, on conviction, will entail on him penal servitude for life or some long term nearly equivalent,—abolish capital punishment for murder, and how often is it likely that the criminal will shrink, if his escape may be thereby facilitated, from adding murder to the first crime? Nay, in many cases it will be his direct interest to do so, simply by way of destroying the evidence of the victim of his previous atrocity. If he silences that evidence he may evade justice altogether, but even if, after adding that second crime to the first deed, he still falls into the hands of justice, he is no worse off than before, because justice has no further penalty to inflict. His back is against the wall; he has all to gain and nothing to lose. We repeat that this consideration alone imperatively requires that death should be inflicted as the penalty for murder. Further than this, we believe that the fear of the capital infliction does operate with very deterrent effect, and especially so upon the "habitual criminal" class. As we have before observed, the saying "while there is life there is hope," applies to criminals, as well as to other people. Appropriating Mr. Scourfield's quotation of last Wednesday—"By all means let reverence for human life be observed," *'que messieurs les assassins commencent.'*"—*Solicitors' Journal*.

The Irish case of Keays against Lane was a cause on petition against trustees for a breach of trust. The trustees of a fund settled on a husband for life or until insolvency, and then to his wife for life for her separate use, at the solicitation of her husband, and with the concurrence of the wife, committed a breach of trust by lending part of the trust funds to the husband, who afterwards became an insolvent. In a suit against the trustees, charging them with a breach of trust, the husband and wife being parties to the suit, the Lord Chancellor holds, that the Court could make a declaration that the husband should recoup the trustees the amount which they were liable to make good to the trust funds, and that a cross bill by the trustees was not necessary. That the husband not being in insolvent circumstances at the time of the loan, his wife's separate estate in the trust fund was then reversionary, and therefore, as it could not then be bound by her, it was not available to recoup the trustees.

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## ONTARIO REPORTS.

## COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

## THE QUEEN V. MASON.

*Bail—Power of Judge in Chambers to rescind order for, when bail fictitious—New sureties.*

Where a prisoner charged with felony had been admitted to bail upon an order of a judge in Chambers, and an application was subsequently made to rescind such order, and to re-commit the prisoner to gaol, on the ground that he had not been committed for trial at the time such order was granted, and also upon the ground that the bail put in was fictitious,

*Held*, that a judge in Chambers had power to make the order asked for; but the order in this case was conditional upon the failure of the prisoner to find new sureties within a specified time.

[Chambers, 16th August, 1869.]

On the 27th July, *McKenzie, Q.C.*, on the part of the private prosecutor Nichol, and with the assent of the Attorney-General obtained a summons, calling on the accused Mason to shew cause why the order made by Mr. Justice Morrison, on the 22nd of May, ordering Mason to be admitted to bail for his appearance to answer a charge of stabbing Robt. Nichol with intent, &c., should not be rescinded, and set aside and vacated on the ground that Mason was not committed for trial by any justice of the peace, at the time the said order was applied for and granted, and that there was no warrant against Mason for the offence, and that no notice of intention of such application was given to the prosecutor or his counsel, and that the County Attorney had no right to consent to the said order, and that the order was improperly obtained, and why the recognizance of bail and the warrant of deliverance under such order should not be set aside and Mason should not be committed for trial, and why he should not furnish the place of residence of John Patterson and Robert Peck, the alleged sureties, and the description of the freehold mentioned in the recognizance of bail, and why such order should not be made, and such direction given as might be lawful and just in the premises or grounds disclosed in affidavits and papers filed.

The affidavits and papers filed upon which this application is based shew in effect: that Mason, on the 8th May last, was charged upon an information laid by a police officer, and arrested for a felonious assault upon one Nichol, by stabbing him with a knife which penetrated his lungs; that the case was heard before the police magistrate of this city, and witnesses examined for and against the prosecution; that on the 19th May, the police magistrate stated that he had decided upon committing Mason for trial, refusing to take bail, and intimating that Mason would have to apply to a judge; that Nichol, through his counsel, Mr. McKenzie, assuming that Mason would be committed, notified the late Mr. Bethune, Q.C., acting agent for the Attorney-General; that he desired to oppose the admission of Mason to bail, and requested to be informed of any application for that purpose; that an application, of which no notice was given to the private prosecution, was made before the Honorable Mr. Justice Morrison, sit-

ting in chambers, on the 22nd May, to bail Mason; that an order was granted, admitting Mason to bail, himself in \$600 and two sureties of \$400 each, for his appearance at the next assizes; that the same having come to the knowledge of Nichol, and Mason being at large, an application was made to the police magistrate, to see the order and to inspect the recognizance of bail; that the first was refused, and the counsel of Nichol was referred to the office of the clerk of the peace, where the police magistrate said it was filed; that the same could not be found there; eventually it was brought and shewn to Nichol's counsel; that by the copy of the recognizance filed, it appears to have been taken on the 29th May before the police magistrate, the two sureties being John Patterson and Robert Peck, who are both described as of the township of York, Yeomen, and endorsed on which is a memorandum signed by the police magistrate, that both of the sureties deposed on oath, that they were freeholders in the township of York, and worth \$400 each over and above their liabilities; that these sureties are not known and cannot be found; that the assessment rolls of the township of York and village of Yorkville were carefully searched, and no such persons were found entered therein, the same being certified under the hands of the township clerks; and the prosecutor Nichol swears, that he made enquiry, and caused diligent enquiry to be made in the township of York and in the village of Yorkville and elsewhere in the county of York, and that he could get no intelligence or information whatever about the said John Patterson or Robert Peck; that he has reason to believe, and doth verily believe that the names John Patterson and Robert Peck are fictitious names, or if such persons exist, they are obscure and unknown persons without standing or substance and of no worth whatever; he also states that he was informed, and believes, that Mason stated since his liberation, that persons of the names of Sheely and McFarlane were his bail. It appears that Mason was in custody from the 30th of April until the 29th May, under a warrant of remand, dated 30th April, signed by the police magistrate, a copy of which is filed (the original being produced to me by the officers from the gaol), upon which warrant there are indorsements of further remands to the 14th May, 19th May, 20th, 21st, then to the 26th May, 27th, to the 29th, then to the 2nd June, and to the 3rd June. That no warrant of commitment was ever placed in the hands of the keeper of the gaol against Mason, but that he was detained in custody at the time of the application before me for bail, upon such remanding warrant, and until he was liberated under a warrant of deliverance signed by the police magistrate on the 29th of May; and Nichol swears that he was informed by the officers at the gaol, that the warrant of deliverance was brought to the gaol by some person while Mason was there in custody, and that no person was at the gaol to take the recognizance of bail before the delivery of the warrant of deliverance. A copy of the depositions, &c., taken upon the charge by the police magistrate was also filed. By it, it appears that the information was laid against Mason on the 29th April; that on the 8th May, witnesses



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were examined and the case remanded until the 14th May; then there appears an entry dated 19th May, that Mason was committed for trial to the next court; then follow other depositions of witnesses apparently for the defence, and sworn on the 18th May.

The only affidavit filed on shewing cause is that of Mr. Nudel, clerk of the police court, in which he states that Mason was committed for trial on the 19th May; that a warrant of commitment was signed and sealed, but not delivered to the gaoler, as there was a counter charge made by Mason against Nichol, in which Mason was a necessary witness; that on the 11th June, Nichol was convicted of an assault on Mason, on Mason's testimony, and that the warrant of commitment against Mason was on that day, to the best of the clerk's recollection, given to a police officer, and that he never saw it since; that during last week (since this application) he procured a duplicate warrant of commitment to be executed by the police magistrate, and placed it in the hands of the gaoler. No affidavit is filed by Mason with respect to the putting in bail, or as to the existence of the sureties, nor any statement made by the police magistrate. On the return of the summons the County Attorney appeared and made a satisfactory statement as far as he was concerned, and the case was argued at length by *R. A. Harrison, Q.C.*, for Mason, and *McKenzie, Q.C.*, for the private prosecutor, and on behalf of the Attorney-General.

MORRISON, J.—On the application to bail, Dr. McMichael appeared for the accused, and the late Mr. Bethune on behalf of the Crown. The County Attorney was also in Court. The question of bailing was discussed in the absence of the depositions and the warrant of commitment (they being sent for). I asked the County Attorney if the case was a bailable one. He stated the circumstances, and that in his opinion it was. It was then agreed by the counsel that the order to bail should go, and after some discussion the bail was fixed at two sureties in \$400, and the accused in \$600. The depositions and papers were then produced, but as the application was disposed of, I did not look at them. The exact terms in which the order was drawn up I do not recollect. In such orders I generally direct that the bail shall be persons to the satisfaction of the County Attornies, those gentlemen being responsible officers under the Crown. In this case the order may have been drawn up conditioned that the bail should be to the satisfaction of the Police Magistrate. As the order or a copy is not produced, I cannot say what the terms were, or whether they were complied with, the prosecutor swearing that he is not able to produce it, the original being in the possession of the Police Magistrate, who refused to give to his counsel a copy of it.

I may here briefly state, that so far as the County Attorney is concerned, that he accurately stated what took place on the application to bail, and I see nothing to warrant any reflection on his conduct on that occasion, or in reference to any proceeding since the order was made.

When I granted the order to bail I necessarily assumed that Mason was in custody upon a war-

rant of commitment for trial, and if it had been suggested that he was only in custody on a remanding warrant from 21st May to the 26th May, I certainly would not have entertained the application. It is, however, contended and sworn to by Mr. Nudel, that Mason was committed for trial on the 19th May, but that the warrant of commitment was not given to the gaoler. It may have been the case, but it is certainly quite inconsistent with the remanding warrant and the indorsements thereon. I may state that I noticed on the original remanding warrant a memorandum that the prisoner was committed for trial under date of 19th May, which memorandum is struck out with the pen, and then follow the further remands after that date to the 8rd June. The recognizance of bail appears to have been acknowledged on the 29th May, the warrant of deliverance being dated the same day. No sensible explanation is given to account for these inconsistencies and irregularities except that which is stated in Nudel's affidavit; but it seems very inconsistent after a prisoner has been committed for trial on the 19th May on a charge of felony to remand him on the same charge from time to time until the 8rd June; and although he was bailed and released from gaol on a warrant of deliverance on the 29th May, that a warrant of commitment against the same prisoner for the same charge should afterwards issue on the 11th June, and be placed in the hands of a police officer, and that all these proceedings should take place under the directions of the same magistrate: and it further appears that since this application a duplicate warrant of commitment has been signed and sent to the keeper of the gaol. These matters, in conjunction with the alleged fictitiousness of the bail, in the absence of any satisfactory explanation, gave occasion on the argument for severe comment, and I regretted much that the Police Magistrate did not think it necessary in justice to his official position to account for these irregularities and repel the imputations involved. On the other hand, Mason the accused in the face of an intimation from the prosecutor's counsel, that if the bail were produced, or if it was shewn by affidavit that the sureties were the persons they were represented to be, that this application would be abandoned, refuses through his counsel to file any affidavit. Under such circumstances, and as the case stands, I can only arrive at the conclusion that the bail are as alleged and sworn to, fictitious or worthless. I am asked by this summons to set aside my own order. I am clearly of opinion that I might do so, as the order was based on the assumed fact that the accused was then in custody on a final warrant of commitment, and which it now turns out was not the case, and the order was inadvertently and improperly granted, and for that reason alone I would be justified in rescinding it; but after reading the depositions, and assuming that the accused was in fact committed for trial as stated by Nudel, the case in my judgment was a bailable one, and the amount of bail fixed sufficient; and if I were now satisfied that the sureties were *bona fide* and not as charged, I would dismiss the application; but when it is alleged that this order, which I ought not to have granted, has been improperly used

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as an authority and cover to liberate the accused, I should be wanting in my duty if I did not direct such steps to be taken as would in some measure remedy the mischief and insure justice being done in the premises. Blackstone in his commentaries, Vol. 4, p. 296, in treating of commitment and bail says: "Bail is a delivery or bailment of a person to his sureties upon their joining together with himself in sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to gaol," and "he that is bailed is in supposition of law still in custody, and the parties that take him to bail are in law his keepers, and may re-seize him to bring him in at any time." 2 Hawkins, P. C. 124. Such being the law, assuming that the bail in the present case are as alleged fictitious, then in reality Mason would be at large: in such a case there must be some remedy. It was denied on the argument that I had any authority to prevent so scandalous an evasion of the law, and that for my doing so no precedent could be found. The absence of precedent can only be accounted for, from no case of the kind having arisen, but if it were so, I would not hesitate to make a precedent, but I am not without authority, for it is laid down in 2 Hawkins, 88, and referred to in 2 Hale, P. C. 126, and in Bacon's Abridgment Title Bail (F). "That if a person be bailed by insufficient sureties he may be required either by him who took the bail or by any other who hath power to bail him, to find better sureties, and on his refusal may be committed; for, insufficient sureties are as none."

If that is law, and on principle and common sense it is, then in this case where it is sworn that the bail are fictitious and utterly worthless,—a conclusion which is borne out by the refusal of the accused to state who they are, or where they are to be found, or that they have any existence,—I shall require the accused Mason to find other sureties, and in case of his neglecting or refusing to do so, to order him to be recommitted for the offence with which he stands charged. An order will therefore go, that Mason do within four days put in good and sufficient bail before myself in Osgoode Hall, viz, himself in \$600, and two sureties in \$400 each, otherwise he shall be recommitted to the custody of the keeper of the common gaol of the City of Toronto.

*Order accordingly.*

#### CUSHMAN ET AL. v. REID.

*Law Reform Act of 1869—Order to try in C. C.—Right of County Judge to try Superior Court cause without a jury.*

When an action on a promissory note made in U. S. sued on as if made in this Province, payable in Canadian currency, was brought down for trial from Superior Court to County Court, without a Judge's order.

*Held*, that such case was improperly brought down, and that it was one in which an order was necessary.

*Held also*, that under sec. 18, of the Law Reform Act, judges of County Courts can try case brought down from Superior Courts without the intervention of a jury.

This is an action brought on a promissory note made at Chicago, and dated the 1st March, 1867, whereby the defendants jointly and severally with the other persons who are not sued, promised to pay the plaintiffs, or order, nine hun-

dred dollars, twelve months after date, with interest at ten per cent. This note is declared upon as if made in this Province, and payable in Canadian currency, but by an admission signed by the attorneys of both parties, it is admitted that the amount thereof was payable in United States. Treasury notes or funds (commonly termed greenbacks), and that whatever, if anything, the plaintiff may be entitled to recover the amount thereof, shall be such sum in Canadian or British currency, as will be equivalent to principal and interest in said notes or funds, allowing credit for the amount endorsed as paid on said instrument. This case was taken down to trial at the sittings of the County Court of the County of Hastings, held at Belleville, on the eight day of June, under the provisions of the Law Reform Act, of 1868, and without a judge's order, under section 4, of 25 Vic., ch. 42, and the issues were tried before the judge of the said County Court, under the 1st sub-section of section 18, of the Law Reform Act, who assessed the damages at seven hundred and fifty three dollars, and fifty three cents, without the intervention of a jury.

*J. B. Read* obtained a summons calling on the plaintiff to show cause why all further proceedings in this cause on the verdict rendered therein at the recent sittings of the County Court of the County of Hastings against the defendant and the entry of judgment therein, should not be stayed, and the said verdict set aside, on the grounds of irregularity and impropriety in this, the said cause was tried before the judge of the said County Court, without the order of a judge of either of the Superior Courts of Common Pleas or Queen's Bench, that the said cause should be tried in said County Court; and on the further ground, that there was no jury process awarded to try the issues, and that the said cause was not one which could be carried down for trial at said court, without a judge's order therefor, or if carried down for trial without an order; that such trial was irregular in trying the same before the County Court judge without the intervention of a jury.

*GALT, J.*—As respects the first objection, I am of opinion, that the case was not one where the amount was liquidated or ascertained by the signature of the defendant, under the provisions of the Law Reform Act of 1868. It is true that the declaration is on a promissory note, and that by the particulars attached to the record, the plaintiff states his claim to be as follows: note \$900, interest at 10 per cent, from 1st March, 1867, \$204 75; but from the terms of the admission above mentioned, it is manifest that the amount stated in the note is only the basis on which the damages in this case were to be assessed and did not show any liquidated or ascertained, amount and the sum due in the present case, as appears from one of the papers filed, was arrived at by calculating \$900 U. S. currency at gold quotation of 141. This case, therefore, was one which should have been taken down by a judge's order, under the 28 Vic. ch. 42, especially as the declaration in this case did not shew the true nature of the claim.

As respects the second objection, namely, that the case was tried by a judge without the inter-

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vention of a jury, I am of opinion, that had the case been properly brought before the County Court, such an objection could not be sustained. This is a very important question, and, as this is, I believe, the first occasion on which the construction of the Law Reform Act, as regards this point, has been brought up, I have thought it expedient to state my reasons. The first sub-section of the 17th section of the Law Reform Act enacts, that all issues of facts and assessments of damages in the Superior Courts of Common Law relating to debt, covenant and contract, when the amount is liquidated or ascertained by the signature of the defendant, may be tried and assessed in the County Court of the county where the venue is laid, if the plaintiff desire it, unless a judge of such Superior Court shall otherwise order. The second sub-section is, "All issues of fact and assessments of damages in actions in any County Court, may be tried and assessed at the election of the plaintiff at any sittings of Assize and Nisi Prius for the county in which the venue is laid, without any order for that purpose. The other sub-section of section 17, has no bearing on the present question. Section 18 is as follows: in amendment of the second section of ch. 81, of the Consolidated Statutes of Upper Canada, entitled "an Act respecting Jurors and Juries," which said second section enacts, that issues of fact shall be tried by a jury, unless otherwise provided, it is enacted, 1st, that all issues of fact in any civil action when brought in either of the Superior Courts of Common Law, or in any of the County Courts of Ontario, and every assessment or enquiry of damages in every such action may, and in the absence of such notice as in the next sub-section mentioned, shall be heard, tried and assessed by a judge of the said courts without the intervention of a jury, provided that if any one or more of the parties requires such issue to be tried or damages to be assessed or enquired of by a jury, he shall give notice to the court in which such action is pending, and to the opposite party that he requires a jury. It was contended on behalf of the defendant in the present case, that the foregoing provisions of the first sub-section, apply only to cases in which the judge presiding at the trial is a judge of the court in which the action is brought, or at any-rate that no County Court judge could decide any issue of fact in a case brought in one of the Superior Courts without a jury.

I cannot agree in this view, because it would have the effect of narrowing to a very considerable extent what was obviously the intention of the Legislature, namely, to avoid the intervention of a jury in all cases where the parties did not necessarily require it. If this construction were adopted, this state of things would arise, namely, that all issues from the County Courts brought for trial at any sittings of Assize and Nisi Prius, must be tried by a jury, and that the presiding judge at Nisi Prius could try such issues only without the intervention of a jury, as were raised in actions brought in his own court. This construction is so much opposed to what was evidently the intention of the Legislature, that in the absence of express words to that effect, I do not feel myself warranted in giving effect to it.

My judgment is, that as this case is one in

which a judge's order was necessary, that all proceedings be stayed on the verdict until the fifth day of Michaelmas Term next.

Order accordingly.

#### FITZSIMMONS V. MCINTYRE.

*Prohibition—Right of County Judge to strike out of record, Counts, the pleas to which oust his jurisdiction—Partial Prohibition.*

A County Court Judge at the trial of a case, made an order, upon the application of Plaintiff's counsel, striking out a count of the declaration and all pleadings relating thereto, because the pleadings thereunder ousted his jurisdiction.

*Held*, that he had the power so to do.

*Held also*, That if prohibition had been applied for before trial, it would only have been granted as to that count. That different causes of action included in same declaration may be severed and tried separately.

[Chambers, June 18th, 1869.]

The Record in this case contained three counts; 1st, for breach of covenant; 2nd, for assault; 3rd, trespass *quare domum fregit*. To the third count defendant pleaded "that the dwelling house was not the plaintiff's, as alleged." The record was entered at the last sittings of the County Court at Pembroke, and a summons for a prohibition was granted before, but not served till after trial. At the trial, defendant's counsel objected to the jurisdiction, as the title to land was brought into question by the plea to the third count, whereupon the plaintiff's counsel applied to the judge for an order striking out the third count and all pleadings relating thereto—which was granted, and the judge proceeded to try, and tried the remaining issues. A verdict was given for plaintiff. The summons for a prohibition having been served, was now argued before Mr. Justice Gwynne.

*Harrison, Q. C.*, shewed cause, and contended that the three counts in the declaration contained separate and distinct causes of action, and the judge at trial had power to sever them. The judge having struck out the third count and pleadings relating thereto, there was nothing on the record to take away his jurisdiction. That the judge had power to make such an order, but that if he had not done so, but had allowed the record to remain as it was, he could have tried the issues on the first two counts, and in that case the prohibition might have gone as to the third count; see *Walsh v. Ionides*, 1 E. & B. 383, and *Kerkin v. Kerkin*, 8 E. & B. 899.

*Oslar*, in support of summons, contended that, as soon as the plea bringing the title to land into question was pleaded, the judge's jurisdiction ceased, and he had no power to do anything whatever in the case thereafter.

*Gwynne, J.*—The defendant obtained a summons calling upon the plaintiff to shew cause why a writ of prohibition should not issue to prohibit the judge of the County Court of the County of Renfrew from further proceeding with a cause in the County Court at the suit of *John A. Fitzsimmons v. James McIntyre*. Upon argument of the summons it appeared that the declaration in the cause contained three counts; 1st, for breach of covenant; 2nd, for assault; and 3rd, trespass *quare domum fregit*, and asportavit of chattels. Issues, in fact, were joined in respect of the causes of action in the 1st and

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2nd counts. To the third count the defendant pleaded that the dwelling house was not the plaintiff's, as alleged. To this plea there was a demurrer. Now these counts contain several and distinct causes of action, and I think it clear, upon the principle and authority of *Walsh v. Jones*, 1 E. & B. 383, and *Kerkin v. Kerkin* 3 E. & B. 398, that the prohibition, if granted, should be restricted to the cause of action contained in the third count. Causes of action of this nature, though capable of being joined in one action under the provisions of the Common Law Procedure Act, are still so far distinct, that a judge may, if he thinks fit, order one or more of the causes of action contained in several counts to be tried separately from those in another or others; and I can see no reason, therefore, why a prohibition may not, nor, indeed, why it should not, be restricted to that count, which alone is in excess of the jurisdiction, leaving the others to be disposed of by the County Court, as the proper court wherein they should be tried. It further appeared that, what in fact has been done, is, that at the trial which came on before the summons was served, the judge, by an order made on the record, has expunged the third count and all the pleadings in respect thereof from the record, and thereupon, the trial of the issues joined on the other counts proceeded, and a verdict has been rendered on them alone. This, as it appears to me, is just what the exigency of the case required the judge to do, and the defendant has therefore obtained all the relief that he was entitled to, or that he should have received by a writ of prohibition. It is therefore unnecessary that the writ should issue, and the summons must be discharged.

*Summons discharged.*

## ENGLISH REPORTS.

### LAURIE V. SCHOLEFIELD.

*Continuing guarantee—Practice—Pleading—Rule 14, H. T. 1853.*

R. & Co., manufacturers, opened a banking account with L., who placed £1,000 to R. & Co.'s account, on A. & B., executing the following guarantee:—"In consideration of L., agreeing to advance and advancing to R. & Co. any sums of money they may require during the next eighteen months, not exceeding in the whole the sum of £1,000, we hereby jointly and severally guarantee the payment of any such sum that may be owing to L. at the expiration of the said period of eighteen months, and undertake to pay the same on demand in the event of R. & Co. making default in the payment of the same. Signed, A. & B." R. & Co. paid into L.'s bank to their account more than £1,000 during the eighteen months, but they overdraw their account several times during the same period. At the end of the time R. & Co. made default in payment of the £1,000, and had overdrawn their account £24, whereupon L. sued A. on the guarantee. After the action brought, B. paid L. £500, his share of the liability. L. obtained a verdict against A. for £1,000.

*Held*, first, that this was a continuing guarantee, and that in placing a construction on it, the position of the parties as well as the words of the contract were to be considered, so that it was not to be avoided by L. allowing R. to overdraw his account to an amount together with the sum of £1,000 exceeding £1,000.

Secondly, that rule 14 H. T. 1853, applied to actions on guarantees, and that therefore the payment of the £500 by B., could not be given in evidence in reduction of debt, but ought to have been pleaded in bar.

[17 W. R., 931.]

Action by the public officer of the Union Bank of England.

The declaration stated that in consideration that the bank would agree to advance and advance to the firm of Russell & Co., sums of money that they might require during the then following eighteen months, not exceeding in the whole the sum of £1,000, the defendant promised and guaranteed to the bank the payment of any such sum that might be owing from the firm of Russell & Co., to the bank at the expiration of the said eighteen months, and undertook to pay the same on demand in the event of the said firm of Russell & Co., making default in the payment of the same; and the bank performed the said consideration for the said promise and guarantee, and advanced to the said firm divers moneys, amounting to £1,000, which they required during the eighteen months, and at the expiration of the said eighteen months, there was owing from the said firm to the bank, £1,000, for and in respect of the said advances, and all conditions were fulfilled, &c., yet the said firm have not, nor has the defendant, paid the said £1,000, and the same remains due and unpaid. And the plaintiff claims £1,100.

*Pleas*.—first, *non assumpsit*; secondly, that there was not owing from Russell & Co. £1,000, or any part thereof; thirdly, that before action the defendant, by one Black, satisfied and discharged the claim by payment; fourthly, that before action Russell & Co. discharged the said claim by payment; fifthly, that the said promise and guarantee was made by the defendant and accepted by the co-partnership solely as a surety for Russell & Co., and that in violation of the said condition in the said guarantee, and without the defendant's consent, the bank made advances to Russell & Co. during the eighteen months greatly exceeding in the whole the sum of £1,000, and thereby the defendant was discharged and released from liability on the guarantee. At the trial before Mellor, J., at the last Spring Assizes at Kingston, the following facts appeared:—

In February, 1867, Russell & Co. desired to open a banking account with the plaintiff's bank, and they were at the same time desirous of obtaining an advance of £1,000 from the bank. The advance, according to the rules of the bank, could only be made upon satisfactory security being given for its repayment. Russell, a partner in Russell & Co., opened an account on the 2nd of February in the usual way, and paid money into the bank to the credit of the firm. At the time the account was opened, it was arranged that the bank should make the advance of £1,000 on having the same secured by the joint and several guarantee of Black & Scholefield.

On the 4th of February the plaintiff gave to Russell & Co., the following guarantee, and on the 8th of February, Russell & Co. brought it back duly signed.

The following is a copy of the guarantee:—

"In consideration of the Union Bank agreeing to advance and advancing to the firm of Russell & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole the sum of £1,000, we hereby jointly and severally guarantee the pay-

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ment of any such sum that may be owing to the said bank at the expiration of the said period of eighteen months, and undertake to pay the same on demand in the event of the said firm of Russell & Co. making default in the payment of the same—Dated the 4th February, 1867.

BLACK & SCHOLEFIELD."

Russell & Co. then requested the bank to place the sum of £1,000 to their credit, who acted on the guarantee and request, and placed £1,000 to their debt in the loan ledger of the bank, which is a book in which it is the usage of the bank to keep all such accounts. The £1,000 was on the same day carried to the credit of Russell & Co. in the customers' ledger of the bank in which the drawing or current accounts of the customers are kept. Payments made into the bank by the customer from time to time to the credit of the drawing account are entered in that account and are kept distinct from the loan account. They are not paid by the customer or received by the bank as repayments on account of the loan, nor are they so applied, but the customer is allowed to draw against them. In this way the drawing account of Russell & Co. was continued down to December, 1867. During that period they generally had a small balance to their credit. But on the 31st December, 1867, there was a debtor's balance against them of £24. The account remained dormant down to the middle of 1868. The drawing account was then further debited with £12 for interest on loan. The eighteen months expired in August, 1868. During that period Russell & Co. had paid into the bank over £1,000. The whole amount of £1,000 was due to the bank at the commencement of the action, with interest from June, 1868, but since action brought £500 has been paid by Black on account of the debts.

A verdict having been found for the plaintiff for £1,000 and interest, a rule was obtained in Easter Term by Honyman, Q. C., leave being reserved to the defendant to set aside the verdict, and enter a nonsuit or verdict for the defendant, on the grounds that the bank had been repaid the £1,000 by Russell & Co., and that the defendant was not liable by reason of Russell & Co., having been allowed to draw for greater sums than £1,000, and that the fourth and fifth pleas were proved; or to reduce the damages by £500, on the ground that the defendant is entitled in assessment of damages to the benefit of the money paid by Black.

Garth, Q. C., and R. Clarke, now showed cause.—If the parties intended to restrict the amount of the loan as well as the liability of the surety, and that the bond should be forfeited if advances beyond the £1,000 were made, they ought to have done this with a clearness and precision not to be mistaken. In *Parker v. Wise*, 6 M. & S. 239, a bond was given by a surety to secure the repayment of moneys advanced which recited that the obligees were bankers and the principals manufacturers, that the latter banked with the obligees, and that they had overdrawn their account, and in order to enable them to carry on their business, they had applied to the obligees to allow them to overdraw at any time such further sum as they should require, so that those further sums together with the amount

overdrawn, should not exceed at any one time £5,000, and the condition was that the principal or surety should pay the sum then owing and such further sums as the obligees should thereafter advance to principals, not exceeding in the whole £5,000. The bankers having advanced more than £5,000 it was contended that they had thereby vacated the obligation, but the court held that the language of the contract did not amount to a prohibition of further advances, but to a qualification only of liability of the surety. They also cited on this point *Henniker v. Wigg*, 4 Q. B., 792; *Williams v. Rawlinson*, 8 Bing. 72; *Addison on Contracts*, 2nd ed. 578; *The North British Insurance Company v. Lloyd*, 10 Ex. 523. The verdict for the full amount can be sustained, although Black has paid £500 since the writ was issued, although we cannot issue execution for the full amount. The defendant ought to have pleaded the payment of the £500 since the action commenced by Black, which he has failed to do: *Beaumont v. Greathead*, 2 C. B. 494. The rule 14 H. T. 1863 expressly states that payment shall not be given in evidence in reduction of damages. Here there is no debt, but the amount is recoverable only as damages; damages cannot be pleaded. The defendant therefore had a right to give the payment in evidence in mitigation of damages.

Honyman, Q. C., and Philbrick, in support of the rule.—Russell & Co. drew from the bank during the eighteen months £1,055. The sum that was to be drawn was not to exceed £1,000. In fact, the bank had advanced the sum of £1,000 two or three times over, as at various times Russell & Co. paid moneys into the bank and then drew it again. This is not the ordinary form of guarantee. It is made a condition of the advance that it is not to exceed £1,000. The defendant might have been satisfied that Russell & Co. were in a position that if they lent them £1,000 they could repay that amount, but if Russell & Co. were to go into large speculations that would materially increase the risk of the surety. If the guarantee is not read in this way the bank could advance any amount, and if it was not repaid within the time the defendant would be liable. The guarantee means that at no time is Russell & Co. to be in the bank debt more than £1,000. In *Parker v. Wise*, the consideration is unlimited. If the £1,000 which was advanced had been repaid the next day, the guarantee would have been exhausted, and the defendant would not have been liable for any fresh advance. Rule 14 H. T. 1863 only applies to the *indebitatus* counts, where you must plead payment. Here you cannot plead payment, as it is not a plea to part of the cause of action. The plaintiff's claim when he sues on the *indebitatus* counts is divisible; here it is not. The object of the rule was where you could plead payment, and did not, you could not use it in reduction of damages. The plaintiff in this action recovers damages and not a liquidated debt, and damages cannot be pleaded to. It was not intended to introduce a new plea by this rule. He cited *Speck v. Phillips*, 5 M. & W. 279; *Adams v. Palk*, 3 Q. B. 2.

Byles, J.—As this guarantee is a written document, we cannot consider in construing it any conversation that took place at the time it

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was made, but we are able to look at the position of the parties. Russell & Co. opened a banking account with the plaintiff, and the plaintiff, at Russell & Co.'s request, agreed to lend them £1,000 on their finding sufficient security for that sum. The defendant and Black having signed this guarantee, the money was placed to Russell & Co.'s account. On looking at the position of the parties, and at the words of this document, we have come to the conclusion that this is a continuing guarantee. It has been argued that this sum has been repaid, and that as the bank has advanced more than £1,000 during the eighteen months, the defendant is not liable, for he says that the document is to be read that Russell & Co. must not advance any sums not exceeding in the whole, the sum of £1,000. The plaintiff says that the words "not exceeding in the whole the sum of £1,000" are to be read with the latter part of the guarantee. The more natural construction is to read these words with the preceding part of the guarantee. However, as we can read it with the latter part with the same propriety, it will carry out the intention of the parties in protecting the parties who advanced the money, and who were guaranteed the repayment of it by the defendant. As to the payment of the £500, whether it ought to have been allowed to have been given in evidence in reduction of damages, or pleaded at bar. All the enactments preceding rule 14, apply to actions *ex contractu*. All those that follow apply to actions of tort, or actions in the nature of tort. The plaintiff in form is right; he was entitled to enter his verdict for £1,000, the defendant ought to have pleaded the payment by his co-surety of the £500. The plaintiff would have been entitled to have retained his verdict, if we had not power to deal with the pleadings; as we have the power, we shall amend the pleadings, but that must be done on payment of costs of this rule by the defendant.

MONTAGUE SMITH, J.—I am of the same opinion. The defendant placed his name to this guarantee as a security for the advances the bank might make Russell & Co. during the eighteen months, and the sureties meant to make themselves liable up to the amount of £1,000 for any sum that might be advanced and owing to the bank at the expiration of that period. The guarantee says to what extent the defendant will be liable, and does not prohibit the bank from making other advances to Russell & Co., not on the security of their guarantee. There is nothing to limit them from so doing. Lord Ellenborough, in *Parker v. Wise*, states his view of a similar contract, and his construction of a similar guarantee, that the plaintiff, if he chooses to advance more than the sum mentioned in the bond, is not precluded from recovering the sum secured by the guarantee.

Now the second point, whether payment in this action can be pleaded, must be decided, as it affects the costs of the rule. This was an action on a bond against one of two sureties for £1,000, during the action and before trial £500, half of the debt on the bond, was paid by the other surety, and a verdict was given for £1,000 against the defendant, the question we have to decide is whether this payment by the co-surety

could be given in evidence at the trial in reduction of damages, so that the plaintiff should have entered this verdict for £581 instead of £1,081, or if this payment should have been pleaded in bar to the action. It seems to me that it ought to have been pleaded in bar. The rule 14 H. T. 1868 is express—"Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar." I think that this rule applies to all cases where a sum of money is paid in payment of part of a claim. If the £500 was paid in this action, it is properly payment within the words of the rule, and it reduces the debt that amount. I agree, however, that we ought to insist that the plaintiff now reduces his verdict to £581, but as the plaintiff is technically right, the defendant must pay the costs of the rule.

BRETT, J.—The case of *Parker v. Wise* and the remarks made in the paragraph on the "limitation of the liability of the surety" in Addition on Contracts apply to this case. The plaintiff is right; this bond must be construed with reference to the usage in business transactions of this kind. I agree with the construction that the Court has put on this contract, and also on their decision as to costs. The rule must be discharged, the plaintiffs consenting to reduce the damages to £500.

## COOPER V. GORDON.

*Dissenters—Ministers—Dismissal of—Majority of Congregation—Rights of.*

In the absence of special usage, rules, or agreement, a Dissenting minister, appointed by his congregation, is not entitled to hold office for life or good behaviour against the will of the majority of such congregation.

[17 W. R. 908]

The object of this suit was to obtain a declaration that the defendant, the Reverend Samuel Clarke Gordon, a Dissenting minister, had, by a resolution which had been passed by a majority of his congregation, being duly dismissed from his office, and to restrain him from continuing to act as the minister of such congregation.

Previously to the year 1707, a congregation of Protestant Dissenters, known by the name of Independents or Congregationalists, were in the practice of assembling for religious worship in a building called the Presbyterian Meeting House, in Broad-street, Reading. In the year 1707 this building became vested in certain members of the congregation, twenty in number, in trust for such congregation "during such time as the assembling of Protestant Dissenters for religious worship should be permitted at the said meeting-house."

About the year 1808, three messuages and other premises adjoining the meeting-house were purchased, the meeting-house was pulled down, and a new meeting-house and vestry-room erected on the site of the old meeting-house and part of the newly-acquired premises, the remainder of which, with the exception of a house and garden, were used for the meeting-house, yard, and burial ground, and as a passage to the vestry-room. All these premises were vested in trustees upon the following trusts, as to the meeting-house, vestry-room, yard, burial-ground, and garden—"Upon trust for the use and benefit of

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the said society or congregation of Protestant Dissenters from the Church of England then belonging thereto, commonly called Independents, and which should from time to time resort to and frequent the said meeting-house and premises, and become members of the said society for the exercise of divine worship therein, and peaceably and quietly to permit and suffer them, and every one of them, to exercise their religion therein, and freely to enter and bury their dead therein, or in some part or parts thereof, under and subject to such orders, rules, regulations, and restrictions as had been and were or should be made and observed in the said society or other religious institutions of the like nature." And as to the house, which was the residue of the premises, "upon trust to permit and suffer the minister or pastor, for the time being, of the said society or congregation of Protestant Dissenters, called Independents, who did or should from time to time meet in the said meeting-house for the exercise of divine worship as aforesaid, to have the use and occupation of the same, or otherwise to receive and pay the rents and profits thereof to such minister or pastor, as the same should become due and payable, for so long a time as such minister or pastor should from time to time be and continue minister or pastor of the said society or congregation, and officiate as such, and no longer, to and for his and their own use and benefit."

The plaintiffs and the defendant Christie were, at the date of the filing of the bill, the sole trustees, and recognized as such by the congregation.

In the year 1865, the congregation considered it desirable that the Reverend William Legg, who had for more than twenty years officiated as their sole pastor, should have some assistance in his duties, and that another minister should be appointed to assist, and act with him. In the following year, Thomas Barham, one of the plaintiffs, who was then acting deacon of the chapel, on behalf of the congregation, and in accordance with a resolution which had been passed by them, invited the defendant, Mr. Gordon, who was a candidate for the co-pastorate, to become co-pastor with Mr. Legg. Mr. Gordon shortly afterwards accepted such invitation, and entered upon his duties. No arrangement was made with Mr. Gordon as to the duration of his co-pastorate.

About a year after the appointment, a portion of the congregation became dissatisfied with Mr. Gordon, and two deacons who were then in office requested him to resign, assigning for their request the eight following reasons:—

1st. That his sermons were too argumentative, containing trains of reasoning which the people could not carry away with them.

2nd. The sermons were above the level of the great mass of the people, not being sufficiently simple.

3rd. They were too Arminian in doctrine.

4th. They set up too high a standard of Christian life, not taking sufficient account of the influences of trials, &c.

5th. There was a deficiency of unction, Gospel power, and Christian experience.

6th. The motives from which Christians were

exhorted to act were not those of Christian love, but of dry, rigid duty.

7th. The work of the Spirit was not sufficiently dwelt upon.

8th. In some of the sermons there was nothing said to unconverted sinners.

A want of harmony between Mr. Gordon and Mr. Legg, led to great unpleasantness, and steps were taken to ascertain the feeling of the congregation on the subject of the dismissal of Mr. Gordon from his office. Accordingly, on the 8th September, 1868, a meeting of the congregation was duly convened, with full notice to Mr. Gordon.

The congregation consisted of 212 persons, a majority of whom, consisting of 116, were present at the meeting. A resolution was passed dismissing Mr. Gordon from his office; the resolution was carried by 115 votes, all the persons present voting in favour of it, with the exception of one, who remained neutral. Notice of the resolution, and notice not to continue to officiate as co-pastor of the congregation, were served upon Mr. Gordon, but he disregarded them, and continued to officiate as before. He also appointed the defendant Pike to receive the pews-rents arising from the chapel, and Pike accepted such appointment, and it was alleged that he had received certain of such rents accordingly.

Mr. Gordon and his supporters, who had protested against the regularity of the meeting, and had not attended it, held meetings of their own, at which resolutions were passed in Mr. Gordon's favour. It was alleged that the conduct of Mr. Gordon, by calling irregular meetings of his partisans among the congregation, and professing them to be of equal authority with the church meetings, and by holding communion service for his own friends at a different hour to established usage, promoted dissension in the congregation, and that his conduct before referred to was very injurious to and brought much scandal upon the church and congregation, and had then already diminished the revenues arising from the pews-rents.

It was admitted that Independents universally hold as fundamental principles that each congregation of persons in church-fellowship, assembling at a particular chapel with their pastor, constituted a church complete in itself, independently of all other congregations of persons professing the same belief and that mere seat-holders, who were not in communion with the church, were not considered to be in church fellowship, or entitled to vote as members of such congregation; and that (in the absence of any special usage, rules, or agreement to the contrary) the power of electing their minister resided entirely with such first-mentioned congregation. The bill alleged that it was the well established usage among Independents, that each congregation might at any time at their discretion dismiss their pastor from his office, and that in the absence of any special circumstances the will of the congregation was ascertained and such power exercised by a vote of the majority of the members. It was admitted that in the present instance no special rules or usage had at any time been adopted by the congregation, but Mr. Gordon contended it was a fundamental principle

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among Independents that (in the absence of special usage, rules, or agreement) all appointments as pastor to such a congregation were for life, so long as the pastor should abstain from preaching unorthodox doctrines, and should not be guilty of immorality or other similar gross misconduct, and that, excepting in those cases, there did not exist in any person or body a power to dismiss such pastor.

The defendant Christie, who was one of the trustees, declined to concur with the plaintiffs in the institution of the suit, upon the ground that he considered such suit uncalled for.

The bill prayed for a declaration that Mr. Gordon had been duly dismissed from his office of co-pastor, and that he might be restrained from preaching or officiating in the chapel referred to; and that both he and the defendant Pike might be restrained from collecting or receiving the pew-rents; and for an account.

*Hardy, Q.C., and Higgins*, for the plaintiffs, contended that in the absence of any special rules, the case must be governed by the invariable practice of the body, which was that a majority of the congregation had a right to dismiss their minister. Without such a power, a congregation might be saddled for an indefinite time with a minister who was unacceptable to them.

*Greene, Q.C., and Yate Lee*, appeared for the defendants Gordon and Pike, and on behalf of the former contended, that in the absence of any rules or agreement with Mr. Gordon on the subject, he was entitled upon his acceptance of the office to hold it for life, excepting he were guilty of immorality or heterodoxy, neither of which, however, had been imputed to him. It was also contended that he was *cestui que trust* under the settlement, and had a life interest in the endowment. They cited *Lewin on Trusts*, 402, s. 17; *Doe d. Jones v. Jones*, 10 B. & C. 718; *Doe d. Nicholl and Others v. McKaeg*, 10 B. & C. 721; *Attorney-General v. Pearson*, 8 Mer. 854, 857, 402; *Foley v. Wontner*, 2 J. & W. 246; *Daugars v. Rivas*, 8 W. R. 225; 28 Beav. 233; *Attorney-General v. Drummond*, 1 Dr & War. 358.

*Whitbread* appeared for the defendant Christie, and submitting that he ought not to have been made a defendant, asked for his costs.

*Greene, Q.C.*, for the defendant Pike, urged that he ought not to be made a party to the suit; that he was only agent of the defendant Gordon, and that he was entitled to his costs. He cited *Pove v. Everard*, 1 Russ. & M. 281; *Calvert's Parties to Suits*, 801.

*Hardy, Q.C.*, in reply, urged that at law the defendant Gordon was a mere tenant-at-will to the trustees, and was removable by a majority either of such trustees or of the congregation. He cited *Perry v. Shipway*, 1 Gif. 1; *Attorney-General v. Aked*, 7 Sim. 321; *Doe d. Earl Thanet v. Gartham*, 1 Bing. 357; *Re v. Gaskin*, 8 T. R. 209; *Porter v. Clarke*, 2 Sim. 520; *Davis v. Jenkins*, 8 Ves. & B. 151.

At the conclusion of the arguments his Honour said that he would not deliver judgment until next term. He strongly exhorted the parties to come to some arrangement in the interval.

May 28—*STUART, V.C.*, said:—On a careful re consideration of the evidence and the argu-

ments in this case, I find no just grounds for the claim of the defendant, the Rev. William Gordon, to continue to perform the duties and enjoy the emoluments of minister against the will of the trustees and the majority of the congregation. There is nothing in any of the written instruments to countenance the notion, that the choice of a minister by the trustees of a congregation is an irrevocable choice, or that he is to continue officiating for life, or during his good behaviour. Indeed, considering the nature of the duties, the purpose of the choice, and the constitution of the congregation, they are inconsistent with any such irrevocable appointment. If a minister has a right to continue in that situation against the will of the majority of the congregation and of the trustees, and to enjoy the emoluments for his life, the number and proportion of the majority could make no difference, and, instead of being the minister of the congregation, he might be the minister of a minority of ten or of one. Such a position would certainly not be that of the minister or pastor of the congregation described in the declaration of trust of 1808.

As to the argument that this congregation is not a society existing by voluntary subscription, but is endowed with property held upon certain trusts, and that the minister is a *cestui que trust* under the deed, it in no degree supports Mr. Gordon's claim to continue minister during his life or good behaviour. By the deed he is a *cestui que trust* only "so long as he shall continue minister or pastor of the society or congregation, and officiate as such, and no longer." The endowment is for the benefit of the congregation and that they may be benefited by the services of a proper minister. The declaration of trust as to the rents and profits which the minister is to receive, creates a trust for the benefit of the congregation and a remuneration for those services by which they are to be benefited. There is no trust or purpose for the personal benefit of the minister, except to reward the services he performs for the congregation. In his answer, Mr. Gordon says, that in the absence of any special usage or rules the will of every such congregation is in all cases ascertained and their powers exercised by the votes of the majority; and he adds this qualification—that the minority are bound by the majority on all points. Only so long as such majority act consistently with the fundamental doctrines and principles held by the whole body. Such a qualification is futile, because as soon as the fundamental doctrines are contravened by the majority they cease to be the fundamental doctrines of the whole body, and unless the minority submit, there is no longer a united body held together by fundamental doctrines and principles. No doubt, the trustees and the congregation by the unanimous vote which appointed Mr. Gordon to be minister might have, at the same time contracted that he should enjoy all the emoluments for his lifetime. It may, however, well be doubted whether such a contract would be valid or binding on the property, or justified by the terms of the trust deed, or the purposes for which the trust is created. That reasonable degree of harmony which is secured by the submission or complete separation of the minority, seems essential to the endurance



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of an association founded for the sacred purposes which united this congregation.

In the case of *Perry v. Shipway* 7 W. R. 406, I notice the authorities which establish these two main points—first, that the minister of a Dissenting congregation at law, is merely the tenant-at-will of the trustees; secondly, that in such bodies the decision of the majority of the trustees binds the minority. Indeed, unless the law were so settled, nothing could follow but confusion and defeat of the very purposes for which these congregations are formed. The submission of the minority is the principle upon which civil society is founded. It is a principle essential for that reasonable harmony which is necessary for the coherence of all societies, great or small, civil or religious. In the case of the *Attorney-General v. Akerd*, it was decided that the minister of a body of Dissenters has no equity to hold his office against the legal right of the majority to dismiss him. The judgment leaves open the question whether in case of a capricious or improper dismissal the court might interfere. That is not very important, because of the improbability that anything done by the majority of the congregation, concurring with the majority of the trustees, would be capricious or improper. This court would be very slow to interfere, and more probably would not interfere at all, with the discretion of the majority. In the present case there is nothing capricious in the decision of the majority of the trustees and of the congregation. It is in vain to try to confound Mr. Gordon's position as to permanence of tenure with that of a public officer, of the rector of a parish, or a parish clerk. The permanence of their tenure is established by the law of the land for public purpose, and for the public benefit. The minister of a Dissenting congregation has a position which the law respects, and will protect as that of one chosen by a voluntary association of private persons, associated for sacred purposes, and entitled to choose a minister suitable to their own particular opinions, whose services are to be rewarded out of their own private funds. He is engaged upon a contract which is merely a private contract, and is to be construed with the same regard to the rights of each of the contracting parties as any other private contract. His position as to tenure under the trustees is clearly defined by the law. There is nothing to show that in equity he can have any position higher than he has at law, nor is there any equity to control that power in the majority of the trustees which is established at law. The power of the majority of the congregation seems to me to rest on the same principle. When the minority refuses to submit, peace is maintained by their seceding and forming themselves, if they can, into another harmonious congregation. This seems more suitable to the purpose for which such religious bodies are formed. It is better than that a contentious and recalcitrant minority should continue members of a congregation which would thereby be disturbed by feelings and passions which should not prevail among persons meeting together for public worship.

It is scarcely necessary to notice the argument that the tenure of his ministry for life must be implied from the terms of the invitation and acceptance mentioning no shorter period. Nothing

that involves an absurdity can by mere implication be made part of a contract. If it is to be implied that he was made minister for his lifetime, even the unanimous vote of the congregation would not displace him; and, if he could not be displaced, there would be the absurdity of his being the officiating minister of a congregation unanimously recusant of his services.

There must be a decree declaring that the defendant, Mr. Samuel Clarke Gordon, is not entitled to officiate or preach in the chapel in the pleadings mentioned against the will of the majority of the society or congregation in the pleadings mentioned, and an order for an injunction against him and the defendant Pike, according to the third paragraph of the prayer of the bill.

It is unnecessary to direct any account; indeed, it has not been pressed for.

The plaintiffs are entitled to the costs of the suit against the defendant, Mr. Gordon, and also against the defendant Pike, notwithstanding the allegations in the answer of the latter, and the argument that he was merely the agent of Mr. Gordon. The evidence proves his interference as to pew rents, and he was properly made a defendant. The defendant Christie, having refused to join as a plaintiff, must bear his own costs.

#### SUTCLIFFE V. HOWARD.

*Will*—Joint tenancy or tenancy in common.

A gift to several persons "during their respective lives, and subject thereto, in trust for their respective children."

*Held*, that it created a joint tenancy for life, and that the children took their parents' shares *per stirpes* as tenants in common.

[V. C. M., 17 W. R. 819.]

The testator in this cause devised real estate to trustees in trust to apply the rents and profits for the benefit of his brothers, James and Samuel Howard, and his sister, Lucy North, during their respective lives in such manner as the trustees should think fit; and, subject thereto, in trust for the respective children of his said brothers and sister as tenants in common. The testator died in July, 1848. James Howard died in October, 1848, leaving several children. Lucy North died in 1867, also leaving children. Samuel Howard was still living, and had several children.

The bill was filed by the trustees of the will to obtain the decision of the Court as to whether James and Samuel Howard and Lucy North took as joint tenants during their joint lives and the life of the survivors and survivor of them, or whether upon the death of each of them one-third of the rents and profits was given over to his or her children.

*Dunning*, for the plaintiffs, the trustees.

*Glasse*, *Q. C.*, and *Humphrey*, for Samuel Howard, the surviving brother, contended that the gift to the brothers and sister during their respective lives was a gift in joint tenancy. After the death of Samuel Howard the children of all three would take *per capita*. It was a gift to three persons during the lives and life of all the three. The word "respective" meant "as each belongs to each." All the authorities inclined towards a joint tenancy. They cited *Woodstock v. Skillett*, 6 Sim 416; *Armstrong v. Eldridge*, 8 B. C. C. 215; *Granswick v. Pearson*, 31 Beav.

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624; *Wood v. Draycott*, 2 N. R. 55; *Macdermott v. Wallace*, 5 Beav. 142; *Bryan v. Twigg*, 16 W. R. 298, L. R. 8 Ch. 183; *Pearce v. Edmesdale*, 8 Y. & C. 246; *Doe v. Abry*, 1 M. & S. 482; *Abbey v. Newman*, 1 W. R. 156, 18 Beav. 431; *Congrave v. Palmer*, 1 W. R. 156, 16 Beav. 435; *Att v. Gregory*, 4 W. R. 486; 8 De G. M. & G. 221.

*Nalder*, for the children of James Howard and Lucy North, was not called upon.

MALINS, V. C., said that on this will there were two questions—one was whether the brothers and sister took as joint tenants, so that the survivor was entitled to the rents, and the other was whether the children took *per stirpes* or *per capita*. The Court found out the intention of a testator from what he had expressed in the will. No doubt what the testator here intended was that each of the brothers and the sister should take an equal share, and that their children should take their shares after their death. Had he said enough to give effect to such an intention? The word "respective" was here a very important word. During their respective lives each took a life interest in one-third, and after their deaths their share went over. The authorities were not in a satisfactory position. It was absurd to suppose the testator meant to prefer a surviving uncle or aunt to the children. The gift was to the parents for life, and at their respective deaths, and subject thereto, to their respective children. The children took the share of their deceased parents *per stirpes*. His conclusion was that the brothers and sister took each a life interest in one-third. His or her children succeeded immediately on his or her death. It necessarily followed that the children took *per stirpes*. The children of the deceased brother and sister took their one-third.

#### PEEK v. PEEK.

*Settlement—Charitable trust—Perpetuity.*

Certain property was conveyed by deed to trustees upon trust to permit any person or persons who should be eligible as in the deed mentioned, in the discretion of the trustees, being a lineal descendant or lineal descendants of the settlor, with his or their families, to occupy the house and part of the property for three calendar months only in each year, and if there should be no such lineal descendant to be approved by the trustees, then upon the trusts thereafter declared concerning the residue; and upon further trust to let the remaining part of the property, except the mansion house, to any person or persons being such descendant or descendants as aforesaid for any term not exceeding seven years; and upon further trust out of the rents and profits to allow the trustees the costs of managing and maintaining the property and certain other outgoings, and to apply the residue for the support or benefit of any poor or aged persons being such descendants as aforesaid as the trustees should think fit; and as to so much of the residue as should not be so applied to apply the same towards the maintenance or relief of any sick or aged poor person living within six miles of the dwelling-house, and to apply so much as should not be so appropriated towards the support and extension of religious instruction or religious or general education or any other benevolent objects, subject to the restrictions therein mentioned. Held, that the whole of the trusts were invalid, and that the heir-at-law was entitled to the property.

[V. C. M., 17 W. R. 1059.]

Richard Peek by a deed dated 10th November, 1825, conveyed a mansion house and hereditaments to trustees and their heirs upon trust that they should from time to time permit any person

or persons being the lineal descendant or descendants of John Peek, deceased, to occupy the said messuage or dwelling-house with the appurtenances, comprising twenty acres or thereabouts, free from rent or taxes, so that each such person with his or her family should occupy the said hereditaments for three calendar months only in each year. And upon the further trust to let the remaining part of the said hereditaments to any person or persons being a lineal descendant of the said John Peek for any term not exceeding seven years at a fair average rent from which at the time of payment a deduction of 20 per cent. should be allowed to the tenant, and upon further trust out of the rents to maintain and keep in good repair the said capital dwelling-house, with the appurtenances and grounds, and to apply the residue for the benefit or advantage of any poor or aged person or persons being lineal descendants of the said John Peek, and as to so much of the residue as should not be so applied upon trust to apply the same in or towards the maintenance or relief of any sick or aged poor person living within six miles of the said capital dwelling-house, and so far as the same should not be so appropriated, upon trust to apply the rents and profits towards the support and extension of religious instruction or religious or general education, or any other benevolent objects, being wholly disconnected with the patronage or control of the state, and within the county of Devon, but giving preference to objects within the six miles aforesaid.

The plaintiff and the other trustees of the settlement except the defendant James Peek were ignorant of the existence of the settlement until Richard Peek's death, which happened on the 7th of March, 1867. James Peek had executed the settlement at the request of his brother, Richard Peek.

Shortly after the said Richard Peek's death the plaintiff and the defendants other than the Attorney-General executed the settlement at the request of James Peek, with the intention of accepting the trusts.

The plaintiff, who was heir-at-law of the said Richard Peek, filed this bill to set aside the settlement.

*Pearson, Q. C.*, for the plaintiff.

*Cotton, Q. C.*, and *Freeling*, for the defendants, the trustees, admitted that they could not carry out the trusts as to keeping up the mansion-house, but they considered that the deed contained a good general trust for charitable purposes: *Liley v. Hey*, 1 Hare, 580; *Attorney General v. Catherine Hall*, Jac. 381; *Fisk v. Attorney General*, 15 W. R. 1200, L. R. 4 Eq. 521.

*Wickens*, for the Attorney General, contended that it was a good gift for charitable purposes, the same as similar gifts to almshouses, though it was not made in regular form. There was no objection to almshouses being maintained for ever. The gift was good at law as a charitable gift, except as to the rents of the mansion-house: *Christ's Hospital v. Granger*, 1 M. & G. 460; *Bernal v. Bernal*, 8 My. & Cr. 559; *Martin v. Margham*, 14 Sim. 280; *Attorney General v. Greenhill*, 12 W. R. 188, 33 Beav. 193.

*Pearson, Q. C.*, in reply. *Forster v. Attorney General*, 10 Ves. 385; *Chapman v. Brown*, 6 Ves 404.

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MALINS, V.C., said it was clear that the trusts regarding the dwelling-house and the adjacent land were void. The deed was an attempt to create a perpetuity for the benefit of the descendants of John Peek, and if the trusts were permitted to take effect the property might be inalienable for generations so come. He was also of opinion that the trusts were so vague and incapable of being carried into effect that they were also void on that ground. But it was contended on the part of the trustees that the residue of the estate was devoted to charity, and that although the particular purposes of the settlement might fail, the general devotion to charity would prevail. It was, however, impossible to ascertain what amount would be required for the purposes to which the rents of the estate were primarily devoted, and he was therefore of opinion that upon the authorities cited he was bound to hold that the charitable trusts declared by the deed failed. The result would be that the whole of the trusts declared by this deed with respect to this property were invalid, and there would be a declaration accordingly, and that the heir-at-law was entitled.

#### PUGH AND ANOTHER V. DREW AND OTHERS.

*Deed—Construction—Intention—Equitable estate—Words of inheritance—Limitation of freeholds by reference to limitation of leaseholds.*

If the intention of a deed be clear to pass an equitable estate in fee simple, it is not necessary that the proper words of inheritance should be used for the purpose.

By deed of settlement, on the 7th of March, 1818, certain leaseholds were settled, as to a third share thereof, in trust, in the events which happened, for A. and B., absolutely in equal shares. In 1819, certain freeholds were settled "upon such and the same trusts, and for such and the same ends, intents, and purposes, and subject to such and the same powers, provisos, and declarations as in the said indenture of the 7th day of March, 1818, are expressed, declared, and contained of and concerning the premises therein mentioned and described, or as near thereto as the difference of the respective estates of the said A. M., M. J., and A. J." (the trustees) "and their respective heirs, executors, and administrators, therein respectively would admit, to the intent that the rents, issues, and profits of the said hereditaments and premises might be had, received, and taken, and the said hereditaments and premises held, sold, conveyed and assigned, and the produce thereof paid and applied unto such person or persons, and in such manner, and at such time and times, in every respect as in the said indenture of the 7th day of March, 1818, is expressed and declared of and concerning the premises therein particularly mentioned and described."

Held, that the want of proper words of inheritance was not fatal, but that A. and B. took equitable estates in fee simple, and not for life only, in one-third share of the freeholds.

[V. C. J., 17 W. R. 888.]

By certain deeds executed in the years 1808 and 1811 respectively, William Bowdler Pugh assigned certain leaseholds, of which he was possessed, in the parish of St. George the Martyr, Southwark, to Andrew Mann, Margaret Jackson, and Ann Jackson, their executors, administrators, and assigns.

By indenture of lease dated the 8th of December, 1817, certain ground on the south side of the New Vauxhall-road, Westminster, was demised by one Henry Rowles to Andrew Mann, Margaret Jackson, and Ann Jackson, for a term of years therein mentioned.

By indenture of settlement dated the 7th of March, 1818, and made between Andrew Mann, Margaret Jackson, and Ann Jackson of the first

part, William Bowdler Pugh of the second part, and Janet Russ Pugh of the third part, it was declared and agreed by all the persons, parties thereto that Andrew Mann, Margaret Jackson, and Ann Jackson should stand possessed of the leasehold premises in Southwark and Westminster above mentioned upon trust, after payment of the rents and performance of the covenants contained in the respective leases, to stand possessed of the surplus rents and profits in trust—

(1) For Janet Russ Pugh, for her sole and separate use during her life; and, after her decease,

(2) To pay and apply the same for the maintenance and education of William Russ Pugh, Jane Russ Pugh, and Margaret Russ Pugh (afterwards Margaret Russ Browne), the three children of Janet Russ Pugh, until they should respectively attain the age of twenty-one years or marry; and, subject thereto,

(3) In trust, as to one-third, for William Russ Pugh (if solvent), during his life, and after his death, for his children who, being sons, should attain twenty-one or die under that age leaving lawful issue, or, being daughters, should attain twenty-one or marry; and in trust, as to the other two-thirds, for Jane Russ Pugh and Margaret Russ Pugh, during their respective lives, for their sole and separate use respectively, without power of anticipation, and with the like respective remainders to their children, as in the case of William Russ Pugh.

(4) "And if it should happen that any one or more of them, the said William Russ Pugh, Jane Russ Pugh, and Margaret Russ Pugh, should have no child, who, being a son, should live to attain the age of twenty-one years, or should die under that age leaving lawful issue, or, being a daughter, should live to attain the age of twenty-one years or to be married, then (subject to the trusts aforesaid) they, the said Andrew Mann, Margaret Jackson, and the survivors or survivor of them, and the executors and administrators of such survivor, should stand possessed of the share or shares of the said William Russ Pugh, Jane Russ Pugh, and Margaret Russ Pugh, who should fail to have any such child as aforesaid, in trust for such of them, the said William Russ Pugh, Jane Russ Pugh, and Margaret Russ Pugh, as should be living at the end and failure of the trusts aforesaid of the same share or shares, and in equal proportions, share and share alike, if more than one should be living.

(5) "And if any one or either of them, the said William Russ Pugh, Jane Russ Pugh, and Margaret Russ Pugh, should be then dead, having left lawful issue, him, her, or them surviving then, upon trust that the issue then living of him, her, or them so dying should have, take and be entitled to the share which their, his, or her parent would have been entitled unto if then living;" and, subject thereto.

(6) In trust for William Bowdler Pugh, if then living, for his own absolute use and benefit; but if William Bowdler Pugh should be dead, then

(7) In trust for Andrew Mann, for his own absolute use and benefit.

The indenture contained the usual powers of appointing new trustees.

By indenture of lease and release of the 15th and 16th days of January, 1819, William Bowd-

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ler Pugh conveyed two freehold messuages in Lambeth-hill, in the city of London, unto and to the use of Andrew Mann, Margaret Jackson and Ann Jackson, their heirs and assigns for ever.

By indenture of the 25th of January, 1819, made between Andrew Mann, Margaret Jackson and Ann Jackson of the first part, William Bowdler Pugh of the second part, and Janet Russ Pugh of the third part, it was declared and agreed by all the persons parties thereto that Andrew Mann, Margaret Jackson and Ann Jackson, their heirs and assigns, should stand possessed (*inter alia*) of the premises assured by the indentures of the 15th and 16th days of January, 1819, "upon such and the same trusts, and for such and the same ends, intents, and purposes, and subject to such and the same powers, provisions, and declarations as in the said indenture of the 7th day of March, 1818, are expressed, declared and contained of and concerning the premises therein mentioned and described, or as near thereto as the difference of the respective estates of the said Andrew Mann, Margaret Jackson, and Ann Jackson, and their respective heirs, executors, and administrators therein respectively would admit, to the intent that the rents, issues, and profits of the said hereditaments and premises might be had, received and taken, and the said hereditaments and premises held, sold, conveyed, and assigned, and the produce thereof paid and applied unto such person and persons, and in such manner and at such time and times in every respect as in the said indenture of the 7th day of March, 1818, is expressed and declared of and concerning the premises therein particularly mentioned and described.

Janet Russ Pugh died in April, 1822.

William Russ Pugh attained his majority in October, 1827, Jane Russ Pugh in May, 1822, and Margaret Russ Pugh in February, 1831.

Margaret Russ Pugh, in July, 1834, married the defendant, Edward Browne.

Jane Russ Pugh died in August, 1862, intestate and unmarried.

William Bowdler Pugh died on the 13th of March, 1841, having devised all his freehold and leasehold estates to the defendant John Pugh, his only son and heir-at-law.

The freehold hereditaments subject to the trusts of the indenture of the 25th of January, 1819, were taken by the Metropolitan Board of Works, and the purchase-money, amounting to £2,100, paid into court. This sum was in May, 1867, invested in the purchase of £2,222 4s. 6d. Bank £3 per Cent. Annuities.

The bill was filed in October, 1867, by William Russ Pugh and Margaret Russ Browne, against (1) the then trustees of the indentures of 1818 and 1819, (2) Edward Browne and his children and (3) John Pugh, the devisee and heir-at-law of the settlor, William Bowdler Pugh.

The plaintiffs contended that, on the decease of Jane Russ Pugh unmarried, one equal third part of the freehold and leasehold hereditaments, subject to the settlements above mentioned, passed to them absolutely as tenants in common, and that one-sixth of the sum of £2,222 4s. 6d. £3 per Cent Consolidated Bank Annuities ought to be transferred to each of the plaintiffs.

The defendant John Pugh, the devisee and heir-at-law of the settlor, contended that, owing to the want of words of inheritance in the indenture of the 25th of January, 1819, the persons entitled thereunder took life interests only in the freeholds; and that, subject thereto, there was a resulting trust in favour of himself.

*Fry* for the plaintiffs.

*Tooke* for the trustees.

*J. Simmonds* for Edward Browne and his children.

*C. T. Simpson*, for John Pugh, the devisee and heir-at-law of the settlor, referred to Sheppard's Touchstone, 522; *Holliday v. Overton*, 15 Beav. 480; *Lucas v. Bandreth*, 28 Beav. 274; *Tatham v. Vernon*, 9 W. R. 822, 29 Beav. 604. [JAMES, V. C.—Is there any authority for the position, that if there be a deed settling leaseholds in trust for A. B., his executors, administrators, and assigns, and freeholds upon the same trusts, or as near thereto as the circumstance of the case will admit, this is to be construed as giving A. B. an estate for life only in the freeholds?] The nearest estate to an absolute interest in leaseholds is an estate for life in freeholds. The fact of its being a trust estate would not affect the construction. No declaration of trust can convey a fee without proper words of limitation.

*Fry*, in reply, referred to the maxim, "*Benignæ sunt faciendæ interpretationes cartarum propter simplicitatem laicorum ut res magis valeat quam pereat*;" *Co. Litt.* 38a; *Roe v. Tramarr*, Willes' Reports, 684; *Broom's Legal Maxims*, ed. 1864, p. 521; and to the dictum of Lord Hobart—"I do exceedingly commend the judges that are curious and almost subtil, *astuti* (which is the word used in the Proverbs of Solomon in a good sense, when it is to a good end), to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act;" *Earl of Clanrickard's case*, Hobart, 277; *Crossing v. Scudmore*, 1 Vent. 141; *Roe v. Tramarr*, Willes, 684.

JAMES, V.C., in giving judgment for the plaintiffs, observed:—Some cases were cited to the effect that a conveyance to A. and his heirs in trust for B. only gives B. a life estate. But Mr. Simpson was obliged to go further, and to maintain that the want of words of inheritance is absolutely fatal under all circumstances. There is no doctrine of this Court which compels me to maintain such nonsense.

*Judgment for the plaintiffs.*

## UNITED STATES REPORTS.

### SUPREME COURT.

#### ESTATE OF JOHN CREAN, DECEASED.

(*Legal Gazette.*)

1. A testator devised real estate in trust for his son for life, remainder to his issue, and in default of issue, then for the use of his (testator's) right heirs forever; the son died unmarried and without issue.  
*Held*, That this was a remainder contingent upon the event of the estate to the son's issue never taking effect, i. e. the death of the son without issue surviving.
2. That a devise to heirs of a testator will be construed as referring to those who are such at the time of the testator's decease, unless a different intent is plainly mani-

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tested by the will and the testator's use of the word *then* as introductory to the limitation, does not sufficiently indicate such different intent.

3. The remainder vested in the son's death without issue surviving, in the heirs of the testator who were living at his (testator's) death.
4. The result would be the same if the estate given to the heirs be regarded as a vested remainder subject to be divested by the death of the son leaving issue surviving. *Etter's Estate*, 11 Harris, 381, and *Reihle's Appeal*, 4 F. Smith, 97, commented on.

No. 15, July term, 1868. Appeal of Mrs. John L. Buzby, from the decree of the Orphans' Court.

Opinion by WILLIAMS, J., delivered July 6, 1869.

John Crean, the elder, devised the real estate, the proceeds of which are in controversy, to Isaac Heylin, his heirs and assigns, in trust, for the use of his son, William, for life; and after his decease, in trust for his children then living, and the lawful issue of such of them as should then be deceased, their respective heirs and assigns forever, in equal parts and shares; such issue to take and receive such part and share only as his, her, or their deceased parents would have had and taken, if then living; and for want of such children, or lawful issue, then in trust for the use of his right heirs forever. The testator's son, William, died unmarried, and without issue, and the question is, who are the persons entitled to the remainder as the right heirs of the testator? Are they the persons who were his heirs at his death, or are they the persons who were his heirs at the death of his son William? It is conceded that under the first limitation, William took only an estate for life. *Powell v. Board of Domestic Missions*, 18 Wr. 46. And that the remainder in fee limited to his children living at his decease, and the lawful issue of his children then deceased, was contingent or executory. But whether the remainder limited to the heirs of the testator on the death of William without children, or issue of deceased children then living, is to be regarded as vested or contingent, has been greatly discussed because of its important, if not decisive, bearing upon the question, whether the heirs at the death of the testator, or the heirs at the death of William, are entitled to the remainder. Perhaps the limitation to the heirs might be regarded as a vested remainder under the decision of this Court in *Etter's Estate*, 11 Harris, 381; and its rulings in *Kelso v. Dickey*, 7 W. & S. 279; *Hopkins v. Jones*, 2 Barr, 69; *Mining v. Batdorf*, 5 Ibid, 508; *Chew's Appeal*, 1 Wr. 23; *Ross v. Drake*, Ibid 373; *Young v. Stoner*, Ibid. 105. The rule is well settled that a remainder is to be regarded as vested, rather than contingent if such a construction is possible. If it did not vest absolutely in the heirs at the death of the testator, why may it not be regarded as having vested *quodam modo* subject to be divested by the death of William leaving children living? The contingency upon which the heirs were to take the remainder, was not a contingency annexed to their capacity to take, but an event independent of them, and not affecting their capacity to take and transmit their right to the remainder.

Their right to the remainder was only prevented from being an absolute interest by the possi-

bility of a child of William coming into *esse* and surviving him.

The limitation here is substantially the same as in *Etter's Appeal*, which was declared to be a vested remainder.

Lowrie, J., says: "The estate to Henry in terms was a life estate. If it was only a life estate, then the estate of his unborn children was a contingent remainder, and that of the other devisees (the testator's surviving heirs) a vested one, subject to be defeated by the death of Henry leaving issue." If then the estate devised to the testator's right heirs was a vested remainder, the heirs at his death took the estate, and as William, the devisee for life, was one of the testator's heirs, it would follow that his devisees became entitled to his share on the termination of his life estate. But there are authorities, and among them some decisions of our own, which show that the remainder in this case is to be regarded as contingent, rather than as vested, and the weight of the authorities seems to be in favour of this doctrine. If the prior fee be contingent, a remainder may be created, to vest in the event of the first estate never taking effect, though it would not be good as a remainder, if it was to *succeed*, instead of being collateral to the contingent fee. Thus, a limitation to A. for life, remainder to his issue in fee, and in default of such issue remainder to B, the remainder to B is good as being collateral to the contingent fee in the issue. It is not a fee mounted upon a fee, but it is a contingent remainder with a double aspect, or on a double contingency. 4 Kent's Com. 200; *Luddington v. Kine*, 1 Ld. Raym. 203; *Fearn on Rem.* 873. The same doctrine is laid down by this court in *Dunwoodie v. Reed*, 8 S. & R. 461; *Waddell v. Rattlew*, 5 Rawle, 281; *Stump v. Findlay*, 2 Id. 168, in reference to similar limitations. If then the remainder is to be regarded as contingent, in whom did it vest? In those who were heirs of the testator at the time of his death, or in those who were heirs at the death of his son William? The remainder, if contingent, did not vest till William's death. But it does not follow that it vested in those who were the heirs at his death. If it did, then it was doubly contingent. The event upon which it was to take effect, and the persons to whom the estate was limited, were both dubious and uncertain. If there was no uncertainty as to the class, the persons composing the class, could only be known and ascertained upon the death of the tenant for life. If the remainder had been expressly limited to the heirs living at the death of the testator, it would have been contingent, in view of the doctrine of the cases last cited; and the question recurs, who are the testator's right heirs?

As a general rule of construction, it is well settled that a devise, or bequest to heirs, or heirs-at-law of a testator, or to his next of kin, will be construed as referring to those who are such at the time of the testator's decease, unless a different intent is plainly manifested by the will; *Halloway v. Halloway*, 5 Vesey, 899; *Elmsley v. Young*, 2 M. & K. 82; *Jenkins v. Gower*, 2 Coll. 537; *Sciffirth v. Badham*, 9 Bear. 870; *Grundy v. Primager*, 1 De Gex, McFonghten & Gordon, 502; *Urquhart v. Urquhart* 38 Eng. Ch. 613; *Abbott v. Bradstreet*, Allen, 589.

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Where, however, it clearly appears that the testator intended his heirs or next of kin at the death of the tenant, or legatee for life, such intent will prevail. *Horne v. Coleman*, 19 Eng. Law & Eq. 19; *Birden v. Haelett*, 2 Mylne & Keen, 90; *Jones v. Colbeck*, 8 Vesey, 272; *Say v. Creed*, 5 Hare, 580; *Sears v. Russell*, 8 Gray, 86; *Minter v. Wraith*, 86 Eng. Ch. (13 Lim.) 52. But where a testator gives property to a tenant for life, and after the death of the tenant for life, to his next of kin, and there is nothing in the context to qualify, or in the circumstances of the case to exclude the natural meaning of the testator's words, the next of kin living at his death will take; and if the tenant for life be such next of kin, either solely, or jointly with other persons, he will not on that account only be excluded. *Say v. Creed*, 28 Eng. Ch. 580; *Elmsley v. Young*, 2 M. & K. 82; *Jenkins v. Gower*, 2 Coll. 537. Nor will the use of the word *then*, as introductory to the bequest or devise over after the death of the tenant or legatee for life, prevent the general rule from applying unless it is so used as to clearly indicate that the next of kin or heirs living at the death of the tenant for life are intended by the testator. *Holloway v. Holloway*; *Ware v. Rowland*, 2 Phillips, 630; *Wharton v. Barker*, 4 K. & Johnson, 483. We see nothing in this will, or in the circumstances of the case, which qualifies the natural meaning of the words, and which clearly shows that the testator intended to limit the estate to those who should be his right heirs at the death of his son William. Certainly the use of the word *then*, as introductory to the limitation, does not indicate any such intention. The limitation is in these words: And for want of such child or children, or lawful issue, then in trust for the use and behoof of my right heirs forever. Obviously the word *then* is not used in this clause as an adverb of time, but as a conjunction signifying, in that case, in that event, or contingency. If this be the meaning, there is nothing to prevent the general rule from applying, and the words must be construed as referring to the heirs of the testator at the time of his death. But the appellants rely upon the rule laid down by Redfield in his treatise on Wills, page 893. He says: The devise or bequest of property to the testator's heirs at law means those who were such at the time of his decease, unless a contrary intent is obvious. But where there are intervening estates, and the remainder is contingent, it will be construed as having reference to those who shall sustain the relation of heirs at the time the estate vests in possession. And in support of this doctrine he cites *Rich v. Waters*, 22 Pick. 563; *Sears v. Russell*, 8 Gray, 85; *Abbott v. Bond*, 4 Allen, 466; and *Abbott v. Bradstreet*, 8 Id. 587. Two of these cases, *Rich v. Waters*, and *Abbott v. Bond*, have no direct bearing on the subject. And the first is virtually overruled in *Abbott v. Bradstreet*. But the general rule is recognised in *Sears v. Russell*, and strictly followed in *Abbott v. Bradstreet*, and neither of them suggest any such modification of the rule as that stated by Mr. Redfield.

In the latter case it was decided that a bequest of the remainder, after a life estate to the heirs at law of the testator, will be construed as referring to those who were such at the time of his

decease, unless a different intent is plainly manifested; and such intent is not to be inferred from the fact that those to whom the life estate is given are among his heirs at law, or that a bequest is given to another heir at law "in full of any share she may be entitled to out of my estate." This conclusion is reached after an elaborate examination of the authorities, and there is nothing in the facts of the case, or in the opinion of the court, which lends any countenance or sanction to the dictum of the able and learned author. If then, as we have endeavored to show, the general rule of construction must prevail in this case, it follows that the testator's heirs at his death, and not his heirs at the death of the tenant for life, are entitled to the remainder.

This conclusion, though reached by a different process, is in substantial harmony with the decisions of this court, in *Etter's Estate*, 11 Harris, 381, and *Reihle's Appeal*, 4 P. F. Smith, 97; in both of which there was a limitation over to the testator's heirs on the death of the tenant for life without leaving children, or issue surviving. In the former, it was held that the remainder vested in the heirs immediately on the death of the testator, and that the tenant for life was excluded by the express words of the will—"my surviving heirs hereinafter named;" in the latter, that the testator's heirs, who were living at his death, including the tenant for life, took the remainder under the limitation as an executory devise. But whether the limitation over to the testator's heirs, in the event of the death of the tenant for life without children living, is regarded as an executory devise, or a contingent remainder, will not affect or vary the rule of construction, as it respects the heirs entitled to take. The limitation to the heirs must be construed to mean those who are such at the testator's death, unless a different intent clearly appears. Whether, therefore, the remainder be regarded as contingent or vested, the heirs of the testator, who were living at his death, are entitled to it under the limitation.

The appeal is dismissed, and the decree of the Orphans' Court is affirmed, at the cost of the appellant.

## SUPREME COURT OF PHILADELPHIA.

HALL V. RULON.

(From the Legal Gazette.)

1. A contract not to carry on a particular business in a particular place is in restraint of trade, and although valid if made, its existence must be proven by clear and satisfactory evidence, and will not be inferred from the fact of the sale of the good will of a business.
2. After making such a sale, however, good faith requires that the vendor shall not hold himself out as continuing his former business, and he will be restrained from so doing.

Appeal from the decree of the Court of Common Pleas of Philadelphia County.

Opinion by WILLIAMS, J., July 6th, 1869.

We have no doubt of the validity of such a contract as is alleged in the bill, if founded on a sufficient consideration; or of the power of the court to restrain its breach by injunction. Our doubt in this case arises from the insufficiency

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of the proof to establish the existence of the alleged agreement. It cannot be inferred from the sale of the good will of the business, and it is expressly denied in the answer. The sealed agreement between the parties, given in evidence by the plaintiff, contains no stipulation or covenant on the part of the defendant, either to retire from the business, or not to resume it again in the city of Philadelphia; and in this respect it fully corroborates and sustains the answer. Nor is there any sufficient evidence that such a stipulation was omitted through the fraud of the defendant, or the mistake of the parties. The only evidence from which such an inference could possibly arise is the testimony of Joseph R. and Alexander Black, but neither of these witnesses proves that it was one of the express terms and conditions of the sale that the defendant was to retire from the business, and not to resume it again in the city of Philadelphia. On the contrary, their testimony amounts to no more than a declaration of the defendant's intention not to go into the business again in Philadelphia, on account of the state of his health, which had compelled him to give it up. The fair inference from their testimony, in connection with the blank left in the agreement, is that while the defendant declared it to be his intention and purpose not to resume the business, he was unwilling and refused to bind himself by a positive stipulation not to resume it at any time thereafter. This inference is greatly strengthened by the plaintiff's admissions to Balderston and Fogg after the defendant had resumed the business, and by the fact that he furnished him, without remonstrance or objection, goods to carry on the business for two or three months after he had resumed it. As the alleged agreement is in restraint of trade, its existence should be established by clear and satisfactory evidence, in order to justify the court in restraining its breach by injunction. There should be no doubt or uncertainty in regard to its terms, or the consideration upon which it was founded. Here the parties have put their contract in writing, and it must be allowed to speak for itself, unless it is clearly shown that the stipulation in question was omitted through fraud or mistake. Under the proofs in this case a court of equity would not reform the agreement as written and sealed by the parties; and if they had not reduced their contract to writing, the evidence would be wholly insufficient to establish it as alleged by the plaintiff.

But there is more of substance in the complaint as to the manner in which the defendant is carrying on the business of an undertaker. He sold the good-will of his business to the plaintiff for a valuable consideration, and good faith requires that he should do nothing which directly tends to deprive him of its benefits and advantages. The bill charges and the evidence shows that he is holding himself out to the public by advertisements, as having removed from his former place of business—No. 1313 Vine Street to his present place of business No. 1539 Vine Street—where he will continue his former business. It is clear that he has no right to hold himself out as continuing the business which he sold to the plaintiff, or as carrying on his former business at another place to which he has removed. *Hogg v. Kirby*, 8 Ves. Ch. Rep.

214; *Churton v. Douglas*, 1 Johns. Eng. Ch. Rep. 174. While, therefore, the appellant is entitled to have the decree of the court below, restraining him from conducting or carrying on his business of undertaking, &c., within the limits of the city of Philadelphia, reversed, it must be so modified as to restrain him from holding himself out to the public by advertisements or otherwise, as continuing his former business, or as carrying it on at another place.

Let the decree be drawn up under the rule.

#### COLLINS v. COLLINS

(From the Legal Intelligencer.)

1. Duress may avoid a marriage.
2. Arrest under void process or under a warrant issued upon a false charge, will avoid a marriage which is constrained by the duress of the imprisonment.

Opinion by BREWSTER, J.

The record in this case was handed to us some weeks since upon the usual rule to show cause why a divorce should not be decreed. We then ordered it upon the argument list, and after hearing from the libellant's counsel we suggested the propriety of taking further proof. The libellant has, accordingly, subpoenaed and examined the respondent, and her deposition along with the other proofs have been carefully considered.

The libel prays for a divorce upon the ground that the marriage was procured by fraud, force and coercion. It alleges this fact, and that the marriage has not been confirmed by the acts of the petitioner. Jurisdiction in such cases was conferred by the Act of May, 8, 1854 (P. L. 644; Br. Dig. 846. s. 7.)

The facts as developed by the record appear to be, that on the fifth day of December, 1868, the libellant was arrested and taken before Alderman Pancoast, of this city, upon a charge (preferred against him by the mother of the respondent) of fornication with the respondent, and begetting her with a child with which she then alleged herself to be pregnant. The libellant declared his innocence, but was unable to give the required bail, and to save himself from imprisonment he married the respondent. They then separated and have never lived together as man and wife. It would seem that the prosecution was set on foot to secure this marriage, and the libellant argues that the evidence shows that the charge made against him was false.

A number of witnesses testify to these different matters.

Mr. Bartlemas, who made the arrest, says that they told libellant at the alderman's office, "he must either marry respondent or go to prison, and to avoid imprisonment he married her. I know he was compelled to marry her or go to prison. He was intimidated and in fear at the time of the marriage, and it was done to save himself from imprisonment. \* \* \* He told me he was not guilty."

The libellant's father testifies to the same facts. He says the respondent threatened imprisonment if libellant did not comply with their demand. "They told him he would be sent to prison forthwith if he refused to marry her. I was not able to go his bail, and he was compelled to marry her to save himself from imprisonment."

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The respondent's account of the transaction is to the same effect. She says in her answer to the third interrogatory: "The libellant was arrested on the oath of my mother charging him with fornication and bastardy with myself. When he was brought to the alderman's office he was told that if he did not marry me he would be sent to prison. He at first refused to marry me, but finally consented, rather than go to prison. He was threatened, of course, and put in fear. He had no bail and would have gone to prison." As to the falsity of the accusation upon which the libellant was arrested, he has submitted several depositions.

Mr. Bartlemas says, that since the marriage he has been informed by a member of the family that the respondent "was mistaken as to her pregnancy."

The libellant's father says: "I have seen respondent repeatedly since the marriage, and she is not in the family way, and was not to the best of my knowledge at the time of the marriage. Respondent told me she was sorry she had been so hasty in having libellant arrested, that she had made a mistake in reference to her pregnancy. I have frequently seen her on the streets with different men, and one in particular. \* \* At the time of the marriage my son was a minor.

Officer Spear says: "I have seen the respondent two or three times since the marriage. I believe to my knowledge she is not pregnant. I am her first cousin.

The respondent, in answer to the third interrogatory, says: "I have discovered that these proceedings were rather hasty, and I have been sorry that they were ever instituted. It was a mistake as to my condition, and I was not in the family way. I was advised by others to have him arrested, and if I had had my own way I would never have had him arrested."

Our first duty is to ascertain from these proofs what are the facts of this unfortunate case, and secondly, to apply the law to the facts thus found.

This is in conformity to the practice of the ecclesiastical courts in England. There, if the parties to a matrimonial contract are *infra annos nubiles*, the Judge passes upon the assent—his certificate is the proof required, and where he has cognizance, courts of law give the same credit to his sentence, as he is bound to yield to their judgment upon matters within their jurisdiction. 2 Lilly's Dbr., 244 c. Here then we have a libel regularly sworn to by the libellant, and wholly unanswered by the respondent. The fact of the arrest, the threat, the consequent fear, the refusal at first to marry, and the subsequent assent as the only means of escape from imprisonment, would seem to be clearly established.

Our principal difficulty has been, on the question of truth or falsity of the charge preferred against the libellant. Had he married the respondent simply of his own motion, or upon her request, the presumption would have been that he was guilty. It is possible, too, that the law would have drawn the same presumption from his act even though it had been preceded by a threat of imprisonment, but here there is no place for presumption. We have direct evidence upon this point. Passing by the statement of Mr. Bartlemas, as to the remark made by a member of the family, we have two witnesses

who have seen the respondent since, and who say that she is not pregnant. One of them adds, that she admitted "she made a mistake." And the respondent confirms all this. She, too, calls it a "mistake," and emphatically says she "was not in the family way."

It must, therefore be conceded that the libellant was arrested upon a false charge, and while operated upon by the terror of that duress and the threat of imprisonment, he married the party who had assisted in setting on foot those proceedings.

Having thus found the facts, let us endeavor to apply the law to them.

If this question were *res nova* it would appear to be of easy solution.

The familiar maxims of the law applicable to such a case would lead the mind to a speedy conclusion.

That no party shall profit by his or her wrong is a principle of universal acceptance. It would be conclusive against his respondent. To come nearer to the point, we find the elementary maxim of the civil law upon this subject, "*Consensus non concubitus faciat nuptias*," or, as it has been transposed, "*Nuptias non concubitus sed consensus faciat*." Dig. L. 50; tit. 17, s. 80.

This has been adopted by the common law. Co. Litt. 83; 1 Black Com. 484.

Applying this principle the libellant would be entitled to a decree of dissolution—for the law will not tolerate for a moment the enforcement of a contract obtained by the duress of personal arrest; putting in fear and the threat of future imprisonment. A party so operated upon cannot in any true sense of the expression be said to be a free agent. He is *in vinculis*. The Roman law avoided contracts, not only for incapacity, but for the use of force or the want of liberty. *At Præcor quod metus causa gestum erit, ratum non habeo*. Dig. Lib. 4, tit. 2. It is true, that it was added, that the force must be such as would overcome a firm man; *in hominem constantissimum cadat*; but Pothier deems the civil law too rigid herein, and states, that regard should be had to age, sex and condition. (Pothier on Obligations, n. 25.)

And Mr. Evans thinks, that any contract produced by actual intimidation of another ought to be held void. (1 Evans; Pothier on Oblig., n. 25, note [a] p. 18.)

The same principle has been recognized in the chancery of England. "Courts of Equity watch with extreme jealousy all contracts made by a party while under imprisonment, and if there is the slightest ground to suspect oppression or imposition they will set the contracts aside." (See the cases cited in note 5 to 1 Story's Eq., sec. 289.)

In *Robinson v. Gould*, 11 Cush. 57, the Supreme Court of Massachusetts says, that duress by menaces which is deemed sufficient to avoid contracts includes a threat of imprisonment inducing a reasonable fear of loss of liberty.

In Louisiana, any threats will invalidate a contract if they are "such as would naturally operate on a person of ordinary firmness, and inspire a just fear of great injury to person, reputation or fortune."

(Civil Code Louisiana, Art. 1845.)



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The contract is equally invalidated "by a false report of threats, if it were made under a belief of their truth." (Id., Art. 1846, 1847.)

The same principle has been recognized in *Hawes v. Marchant*, 1 Curt. 186; *Kelsey v. Hobby*, 16 Pet. 269; and in the Pennsylvania case of *Gillett v. Ball*, 9 Barr, 18, where the fact that a note was given under duress in settlement of a charge like that preferred against this libellant was held to be a full defence. Indeed, the authorities upon this point might be almost indefinitely multiplied, for wherever the voice of the law has been heard, no man has been held to a contract extorted from him by force.

So, too, fraud has always been deemed the equivalent of force and as equally operative in annulling a compact obtained through its agency. So sternly has this principle been applied, that it has been wisely extended to fraud arising from facts and circumstances of imposition. In *Neville v. Wilkinson* (1 Bro. Ch. R. 546), Lord Chancellor Thurlow remarked; "It has been said, here is no evidence of actual fraud on R. but only a combination to defraud him. A court of justice would make itself ridiculous if it permitted such a distinction. If a man upon a treaty for any contract, will make a false representation, by means of which he puts the party bargaining under a mistake upon the terms of the bargain, it is a fraud. It misleads the parties contracting on the subject of the contract."

The rule has been applied in all its rigor even where the misrepresentation was innocently made by pure mistake. (1 Story's Eq., s. 193, cases cited, note 2.) And a contract of partnership was recently set aside in England upon this principle, although the defendant was free from fault, and the plaintiff had been guilty of laches. in not examining the books for four years (*Rawlins v. Wickham*, 28 Law J. Rep. Chan. 188; 3 De Gex and Jones, 804; 1 Giffard, 355).

In a still more recent case, a wife having been guilty of adultery, in order the more easily to carry on the illicit intercourse, induced the husband (who was ignorant of her crime) to execute a deed of separation, whereby he covenanted to pay her an annuity and to allow her to live separate. The adulterous intercourse was continued, discovered by the husband, and a divorce was obtained. The husband then filed a bill to set aside the deed of separation. It had not been obtained by any misrepresentation, and the Vice-Chancellor dismissed the bill. But the Lord Chancellor reversed the decree below, and held, that the deed must be set aside, on the principle that none shall be permitted to take advantage of a deed which they have fraudulently induced another to execute. *Evans v. Carrington*, 30 Law J. Rep. Chan. 864; 2 De Gex, Fisher and Jones, 489; 1 Johnson and Hemming, 598.

It must be plain, therefore, that if this proceeding were a bill in equity to set aside a note or bond obtained from this libellant under the circumstances presented by this record, we should be compelled to order its cancellation. It remains only to be seen whether the contract of marriage is an exception to the general principle. Mr. Bishop informs us that there is no difference in this respect between marriages and other contracts. He says, "Where a consent in form is

brought about by force, menace or duress, a yielding of the lips but not of the mind it is of no legal effect. This rule, applicable to all contracts, finds no exception in marriage." Bishop on Marriage and Divorce, s. 210. He cites in support of this a number of decisions, and amongst others the leading case of *Hurford v. Morris*, 2 Hag. 423, where the guardian of a young school girl, having great influence and authority over her, took her to the continent, hurried her there from place to place, and married her substantially against her will. The marriage was held to be void.

So, too, in the Wakefield case, the marriage of Miss Turner was set aside by Act of Parliament. The fraud there employed was the representation of her father's bankruptcy, and that the only escape for her parent was her marriage with one of the conspirators.

The law has not always been so favorably applied where the man was the injured party.

In *Jackson v. Winns*, 7 Wendell, 47, Enoch Copley had been arrested under the Bastardy Act. He was taken to the house of the father of the prosecutrix, and from thence he went in company with her, her parents and the constable, to the office of the Justice, who performed the marriage ceremony, although the groom refused to take the hand of the bride and said nothing. It was insisted that there was no consent, and that there was duress, but the Supreme Court of New York sustained the legality of the marriage, declaring, that they could "not say that the mere circumstances that Copley had involved himself in difficulty with the Overseers of the Poor, and that he took the step he did with some reluctance, were enough to show that he did not yield his full and free assent to the marriage solemnized before the Justice."

Mr. Bishop, commenting on this and other cases, says (s. 212), "Perhaps the result would be otherwise if the arrest were under a void process; and a doubt may be entertained, whether it would not be, if shown to be both malicious and without probable cause."

This doctrine is fully sustained by the case of *James v. Smith*, where Judge Dewey, of the Supreme Court of Massachusetts, declared a marriage null and void which had been solemnized whilst the libellant was in custody upon a charge similar to that preferred in this case. Bishop, s. 213, note. It is true, the arrest of James was without warrant, and that there can be no duress in lawful imprisonment. *Stauffer v. Lathaw*, 2 W. 167; and *Winder v. Smith*, 6 W. & S. 429; but no court could pronounce the duress lawful which was the result of a warrant obtained by a false information.

In *Scott v. Shufeldt*, 5 Paige, 43, Chancellor Walworth said, that the statute authorizing the court to annul a marriage when the consent was obtained by force, was never intended to apply to a case where the putative father of a bastard elects to marry the mother instead of contesting the fact. But he yet decreed that the marriage was null, because, the parties being both white, and the child being a mulatto, it was evident that the complainant had been made the subject of a gross fraud.

—It will be seen, that in *Jackson v. Winns*, and *Scott v. Shufeldt*, there was no solicitation of

## GENERAL CORRESPONDENCE.

marriage on the part of the prosecutrix, nor was there any threat of imprisonment. In the first case, there was no proof of the falsity of the charge. The same remarks apply to *Hoffman v. Hoffman*, 6 Casey, 417, where there was not even an arrest. Mr. Justice Thompson, in his able and learned opinion, says: "Nor was there even a threatened prosecution by the respondent for the alleged wrong. The case was clear of actual or constructive force." Nor has there been, in this case, "a child born during wedlock, of which the mother was visibly pregnant at the time of marriage," as in *Page v. Dennison*, 5 Casey, 420, 1 Grant, 377.

Here we find:—

1. An arrest upon a false charge.
2. The assertion of innocence by the libellant.
3. The threat to imprison him upon "process sued out maliciously and without probable cause." 2 Greenleaf on Ev., s. 802.
4. The assent of the lips but not of the mind or heart to the performance of a ceremony whilst under this illegal duress.
5. The repudiation of the alleged contract by both parties from that time forth.
6. The refusal of the respondent to deny any of these matters by filing an answer, and, on the contrary, her admission under oath, as already noted.

No case can be found, in which any contract thus extorted was enforced, and every instinct of humanity clamors for its abrogation.

The language of Mr. Justice Agnew, in his clear and convincing opinion in *Cronise v. Cronise*, 4 P. F. Smith, 264, has peculiar application to these facts. He says: "The three procuring causes, to wit, fraud, force and coercion, are linked together in the same clause, equally qualify the same thing, to wit, an alleged marriage, and have a like operation as causes of dissolution. Force and coercion procure not a lawful marriage, but one only alleged, where the mental assent of the injured party is wanting. Fraud has a like effect; it procures, not a marriage fully assented to by both of the parties and duly solemnized, but one where the unqualified assent of the injured party is wanting, and where the very act of marriage itself is tainted by the fraud."

*Decree for libellant.*

## GENERAL CORRESPONDENCE.

*Remarks on the new Division Court Rules.*

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Allow me to offer, through your columns, a few remarks on the "new rules" just come in force from the "Board of County Judges." I find upon examining them many valuable and much needed amendments and additions to the old rules, and doubts as to the construction and meaning of many of the sections of the Division Court Act heretofore left in uncertainty, or decided in different ways by different judges in Division Courts,

are cleared up. The new forms by these rules are, although altered from the old ones (thus, of course, giving clerks considerable extra trouble), much better, more *court like*, and simpler than the old ones. The Division Courts, by the rules and forms (although these are so voluminous) as to practice and efficiency are more respectable and responsible to the public. It is evident that much thought, skill and learning have been brought to bear in the compilation of the new rules. The rules from 93 to 100 inclusive, were loudly called for by the public, and "the Board of Judges" deserve the thanks of suitors everywhere for them.

The rules allowing the renewal of *warrants of commitment* are very judicious, but it is a pity that they had not allowed (as indeed is the case in England in County Courts) warrants to be countersigned by judges, or even by clerks of other counties, when the debtor may have moved from his own county into another during the currency of the warrant. It is a pity too that the judges had not allowed *clerks fees* for filing papers on Chamber applications and new trials. The business would have been done more orderly and carefully then. And the applicant for a new trial should have been made to pay for all affidavits used to oppose his application if unsuccessful, or if new trial should be granted for his benefit.

I cannot see the necessity in these rules of increasing witness fees to 75 cents a day, leaving *poor jurors* with only 10 cents a day. The garnishee rules are also very good, and I observe that clerks are now given forms, as to procedure, when under the Common Law Procedure Act, they are obliged to carry out the orders of County Court or Superior Court Judges.

The contested point as to the validity of a Division Court judgment over six years old, is set at rest, and the manner of its revival is fixed by rules 156 and 157. The rule 160, as to framing transcripts to the County Courts, is well timed. So is the rule 125 as to parties leaving their place of residence or address with the clerk. The rules as to infants (126) and as to the statute of limitations (127) are admirable, and meet the wants felt in thousands of cases, and assimilate the practice of these courts somewhat with the Superior Courts. Sub-section "F." of rule 142 is very good. If it was within the power of the judges, it is a pity they had not made it clear that a judge

## GENERAL CORRESPONDENCE—REVIEW—APPOINTMENTS TO OFFICE.

granting a new trial might impose on the party applying and obtaining his desire a condition that he should pay the successful litigant all his costs, such as affidavits and attorney's fees on opposing new trials. Rule 144 was very necessary. Judges (in many cases) have been prone to interfere at the solicitation of friends of suitors with their own orders *ex parte*! For instance, a man obtains at great trouble an order to commit against a dishonest debtor, and the debtor when arrested is taken to the judge, his story and wrongs heard—*ex parte*—and the creditor next sees him in the street at large laughing in his face. The judge has taken upon himself to nullify his own order, and to say that the creditor shall not collect his debt! A pretty power surely for any judge to assume! Rules 90, 91, 92 and 93, as to the duties of Bailiffs, and giving them an attendance fee at Court in default suits, are very necessary.

Rule 95, which has reference to clerks of foreign counties principally, is very admirable.

Rules from 41 to 50 inclusive, on *Replevin process*, are just what were required.

In interpleader matters the rules might have been more explicit and enlarged. For instance, one original interpleader summons should have been made to answer, where many claimants arise as to goods seized under one execution, each claimant being served only with a copy. Bailiffs, as the law and practice now are, can make a dozen original suits out of as many claims, all arising from one seizure. It is a pity that more had not been said in the rules as to the conduct of Bailiffs in executing writs of execution.

Might not something have been said as to Bailiff's returns of "*Nulla bona*?" as to whether executions bind the goods as soon as the bailiffs receive them? Perhaps not this last. I think it would have been better had a rule been made requiring clerks in outer counties to forward monies or returns on all transcripts sent them, charging the costs of transmission to the defendant who caused it.

I will not further extend these remarks in this letter.

C. M. D.

Toronto, 25th August, 1869.

## REVIEWS.

PARLIAMENTARY GOVERNMENT IN ENGLAND, ITS ORIGIN, DEVELOPMENT AND PRACTICAL OPERATION. By ALPHEUS TODD. Vol. II. London: Longmans, Green & Co., 1869.

It is with regret that we have again to announce the postponement of our review of the second volume of this work. Nothing but a profound sense of its value and importance, and our present inability to do it justice, compels us to defer noticing it in this number. The reading of the volume demands more time than we have had at our disposal for the purpose since the receipt of the volume. And we cannot in fairness to the learned author, or in justice to ourselves, review the volume until we have carefully looked over it, which we fully expect to do before the next issue of the *Law Journal*.

## APPOINTMENTS TO OFFICE.

## ASSISTANT COMMISSIONER OF CROWN LANDS.

THOMAS HALL JOHNSON, Esq., to be Assistant Commissioner of Crown Lands, in the room and stead of Andrew Russell, Esq., resigned. (Gazetted Aug. 21, 1869.)

## CROWN LANDS' AGENT.

ANDREW RUSSELL, Esq., to be Resident Agent for the sale of Public Lands in the County of Wellington, in the place of James Ross, Esq., resigned. (Gazetted August 21, 1869.)

## STIPENDIARY MAGISTRATE AND REGISTRAR.

JOHN DORAN, of the Town of Perth, Esq., to be Stipendiary Magistrate and Registrar for the District of Nipissing, in the room and stead of Thomas H. Johnson, Esq., resigned. (Gazetted August 21, 1869.)

## NOTARIES PUBLIC.

PETER MCCARTHY, of the Town of St. Catharines, Esq., Barrister-at-Law. (Gazetted July 3, 1869.)

## CORONERS.

JAMES WALLACE, of the Village of Alma, and JAMES McCULLOUGH, of the Village of Everton, Esquires, M. D., to be Associate Coroners, within and for the County of Wellington. (Gazetted June 19, 1869.)

WESLEY F. ORR, of the Village of Lynden, Esq., to be Associate Coroner, within and for the County of Wentworth. (Gazetted July 31, 1869.)

JOSEPH DIX, of Garden Island, Esq., to be an Associate Coroner, within and for the County of Frontenac. (Gazetted August 23, 1869.)

In an English case of Hopkins it was lately decided in the Court of Exchequer, that a creditor who takes from his debtors agent on account of the debt the cheque of the agent, is bound to present it for payment within a reasonable time, and if he fails to do so and by this delay alters for the worse the position of the debtor, the debtor is discharged, although he was not a party to the cheque.

## A FEW WORDS ON ARBITRATION.

## DIARY FOR SEPTEMBER.

4. Sat... County Court of York Term ends.  
 5. SUN. 15th Sunday after Trinity.  
 12. SUN. 16th Sunday after Trinity.  
 19. SUN. 17th Sunday after Trinity.  
 26. SUN. 18th Sunday after Trinity.  
 29. Wed. St. Michael

THE  
**Canada Law Journal.**

SEPTEMBER, 1869.

## A FEW WORDS ON ARBITRATION.

There are two points touching arbitration, one general and the other particular, to which we desire to direct attention. The first is the suggestion of a remedy for the usually interminable length of arbitration proceedings. A case is referred at Nisi Prius or by a judge in Chambers, to some one or three gentlemen of the bar, and from that time forth it is uphill work to get it brought to a conclusion. The convenience of all parties—referee, plaintiff and defendant, plaintiff's and defendant's legal advisers, plaintiff's and defendant's witnesses—has to be consulted, and frequent enlargements result in this endeavour. Then every other piece of business is made to take priority over this: and so the reference drags its slow length along, at an expenditure of time and money, that is anything but soothing to the losing party. Mr. Justice Gwynne, in one of his charges at the Toronto Assizes, referred to the advisability of having official referees, to whom might be referred the assessment of damages in certain cases. So we say (and the matter has also been occupying attention in England). Let there be three or more official arbitrators or referees appointed from gentlemen at the bar, who need not on that account give up their practice, but who shall, when a cause is referred to them, act *pro hac vice* as officers of the court and subject to the rules of the court. These referees can then be made subject to the court's directions for the prosecution of business *de die in diem*, till the reference is disposed of. It may be, however, that the end of expedition and correctness in the despatch of arbitration cases, might be better attained by the appointment of an additional officer for each court, whose business it should be to

determine these cases and other references, in the same manner as a master in Chancery.

The other point is with regard to the complex arbitration clauses in the Common School Acts, which have frequently been adverted to by the judges in no very complimentary terms. We have several clauses in the Consolidated Act, which it would require a very skilful lawyer to manipulate, and which almost certainly bring to grief every Local Superintendent and School Trustee, who meddles therewith. The series of cases wherein Kennedy figures as plaintiff, is a standing proof of the folly of these provisions. See *Kennedy v. Burness et al* 15 U. C. Q. B., 473; *Kennedy v. Hall et al*, 7 U. C. C. P., 218; *Kennedy v. Burness et al*, and *Murray v. Burness et al*, 7 U. C. C. P. 227.

And again we have a further accumulation of clauses in the Act of 1860 (23 Vic. cap. 49) which have been lately exposed in the courts. Section 9 of that Act is a curious product of legislative skill, and is thus commented on by the Chief Justice of the Common Pleas, in a recent decision: (*Birmingham v. Hungerford*, 19 U. C. C. P. 414):—"It is right, however, to notice the wording of section 9 of the Act of 1860, on which defendants claim to have proceeded: 'If the trustees wilfully refuse or neglect, for one month after publication of award, to comply with or give effect to an award of arbitrators appointed, as provided by the 84th section of the said U. C. C. S. Act, the trustees so refusing or neglecting shall be held to be personally responsible for the amount of such award, which may be enforced against them individually by warrant of such arbitrators within one month after publication of their award.' It would seem to be simply impossible to carry this section into effect. If they refuse for one month after publication they are to be liable, and the award may be enforced against them by warrant within one month after publication."

The Chief Justice then proceeds to point out what undoubtedly is the true remedy for this cumbrous mode of procedure:—"This is another of one of those most unfortunate cases which have come before the courts in consequence of errors naturally committed in the exercise of statutable powers to decide claims and issue executions otherwise than by regular legal process. A most arduous and dangerous duty is imposed on arbitrators, by direct-

## THE CRIMINAL LAWS.

ing them to issue their warrant for the seizure of property at the risk of being made trespassers for unintentional errors; but it is impossible to leave persons whose goods are forcibly and illegally seized without adequate remedy. The design for the avoidance of litigation and cost is most laudable; but experience demonstrates the almost impossibility of carrying it into successful operation. The substitution of the simple process of the Division Court (irrespective of amount) for the cumbrous and costly machinery of arbitration would remove all difficulty. The cost need only be a few shillings; here the costs mentioned in the award are \$25."

What is wanted is a short statute repealing all these sections relating to arbitration, and giving jurisdiction to the Division Courts, with right of appeal to the Queen's Bench or Common Pleas in cases where the claim exceeds, say \$50. This is all that is needed to adjust a matter which has frequently proved the occasion of great trouble and loss of money to the officers of our Common School system.

## THE CRIMINAL LAWS.

We hope hereafter to speak at further length of the consolidation of the Criminal Laws, which has been so thoroughly done by the labours of the learned gentlemen to whom it was entrusted. We have only space at present to give to our readers two of the Acts as they will appear in the coming volume of Statutes of 32-33 Victoria.

## CAP. XXVIII.

*An Act respecting Vagrants.*

[Assented to 22nd June, 1869.]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1.—All idle persons who, not having visible means of maintaining themselves, live without employment,—all persons who, being able to work and thereby or by other means to maintain themselves and families, wilfully refuse or neglect to do so,—all persons openly exposing or exhibiting in any street, road, public place or highway any indecent exhibition, or openly or indecently exposing their persons,—all persons who, without a certificate signed, within six months, by a Priest, Clergyman or Minister of the Gospel, or two Justices of the Peace, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wander about and beg, or who go about from door to door, or place

themselves in the streets, highways, passages or public places to beg or receive alms, all persons loitering in the streets or highways and obstructing passengers by standing across the footpaths or by using insulting language or in any other way, or tearing down or defacing signs, breaking windows, breaking doors or door plates, or the walls of houses, roads or gardens, destroying fences, causing a disturbance in the streets or highways by screaming, swearing or singing, or being drunk, or impeding or incommoding peaceable passengers,—all common prostitutes, or night walkers wandering in the fields, public streets or highways, lanes or places of public meeting or gathering of people, not giving a satisfactory account of themselves,—all keeper of bawdy-houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses, not giving a satisfactory account of themselves,—all persons who have no peaceable profession or calling to maintain themselves by, but who do for the most part support themselves by gaming or crime or by the avails of prostitution,—shall be deemed vagrants, loose, idle or disorderly persons within the meaning of this Act, and shall, upon conviction before any Stipendiary or Police Magistrate, Mayor or Warden, or any two Justices of the Peace, be deemed guilty of a misdemeanor, and be punished by imprisonment in any gaol or place of confinement other than the Penitentiary, for a term not exceeding two months and with or without hard labor, or by a fine not exceeding fifty dollars, or by both, such fine and imprisonment being in the discretion of the convicting Magistrate or Justices.

2.—Any Stipendiary or Police Magistrate, Mayor or Warden, or any two Justices of the Peace, upon information before them made, that any person hereinbefore described as vagrants, loose, idle and disorderly persons, are or are reasonably suspected to be harbored or concealed in any bawdy-house, house of ill-fame, tavern or boarding-house, may, by warrant, authorize any constable or other person to enter at any time such house or tavern, and to apprehend and bring before them or any other Justices, all persons found therein so suspected as aforesaid.

## CAP. XXXIII.

*An Act respecting the prompt and summary administration of Criminal Justice in certain cases.*

[Assented to 22nd June, 1869.]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1.—In this Act the expression "a competent Magistrate" shall, as respects the Province of Quebec and the Province of Ontario, mean and include any Recorder, Judge of a County Court, being a Justice of the Peace, Commissioner of Police, Judge of the Sessions of the Peace,

## THE CRIMINAL LAWS.

Police Magistrate, District Magistrate or other functionary or tribunal invested at the time of the passing of this Act with the powers vested in a Recorder by chapter one hundred and five of the Consolidated Statutes of Canada, intituled "*An Act respecting the prompt and summary administration of Criminal Justice in certain cases*," and acting within the local limits of his or of its jurisdiction, and any functionary or tribunal invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more Justices of the Peace; and as respects the Province of Nova Scotia or the Province of New Brunswick, the said expression shall mean and include a Commissioner of Police and any functionary, tribunal or person invested or to be invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more Justices of the Peace, and the expression "the Magistrate" shall mean a competent Magistrate as above defined;

And the expression "the Common Gaol or other place of confinement," shall, in the case of any offender whose age at the time of his conviction does not, in the opinion of the Magistrate, exceed sixteen years, include any Reformatory Prison provided for the reception of juvenile offenders in the Province in which the conviction referred to takes place, and to which by the law of that Province the offender can be sent.

2.—Where any person is charged before a competent Magistrate with having committed—

1. Simple larceny, larceny from the person, embezzlement, or obtaining money or property by false pretences, or feloniously receiving stolen property, and the value of the whole of the property alleged to have been stolen, embezzled, obtained or received does not, in the judgment of the Magistrate, exceed ten dollars; or,

2. With having attempted to commit larceny from the person or simple larceny; or,

3. With having committed an aggravated assault, by unlawfully and maliciously inflicting upon any other person, either with or without a weapon or instrument, any grievous bodily harm, or by unlawfully and maliciously cutting, stabbing or wounding any other person; or,

4. With having committed an assault upon any female whatever, or upon any male child whose age does not, in the opinion of the Magistrate, exceed fourteen years, such assault being of a nature which cannot, in the opinion of the Magistrate, be sufficiently punished by a summary conviction before him under any other Act, and such assault, if upon a female, not amounting in his opinion to an assault with intent to commit a rape; or

5. With having assaulted, obstructed, molested or hindered any Magistrate, Bailiff, or constable, or officer of customs, or excise or other officer in the lawful performance of

his duty, or with intent to prevent the performance thereof; or,

6. With keeping or being an inmate, or habitual frequenter of any disorderly house, house of ill-fame or bawdy-house;—

The Magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way.

8.—Whenever the Magistrate before whom any person is charged as aforesaid proposes to dispose of the case summarily under the provisions of this Act, such Magistrate, after ascertaining the nature and extent of the charge, but before the formal examination of the witnesses for the prosecution, and before calling upon the party charged for any statement which he may wish to make, shall state to such person the substance of the charge against him, and (if the charge is not one that can be tried summarily without the consent of the accused) shall then say to him these words, or words to the like effect: "Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial by a jury at the (*naming the Court at which it could soonest be tried*);" and if the person charged consents to the charge being summarily tried and determined as aforesaid, or if the power of the Magistrate to try it does not depend on the consent of the accused, the Magistrate shall reduce the charge into writing, and read the same to such person, and shall then ask him whether he is guilty or not of such charge.

4.—If the person charged confesses the charge, the Magistrate shall then proceed to pass such sentence upon him as may by law be passed, (subject to the provisions of this Act), in respect to such offence; but if the person charged says that he is not guilty, the Magistrate shall then examine the witnesses for the prosecution, and when the examination has been completed, the Magistrate shall inquire of the person charged whether he has any defence to make to such charge, and if he state that he has a defence, the Magistrate shall hear such defence, and shall then proceed to dispose of the case summarily.

5.—In the case of larceny, feloniously receiving stolen property or attempt to commit larceny from the person, or simple larceny, charged under the first or second sub-sections of the second section of this Act, if the Magistrate, after hearing the whole case for the prosecution and for the defence, finds the charge proved, then he shall convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any period not exceeding six months.

6.—If in any case the Magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand, stating the fact of such dismissal.

7.—Every such conviction and certificate

## THE CRIMINAL LAWS.

respectively may be in the form A and B, in this Act, or to the like effect.

8.—If (when his consent is necessary) the person charged does not consent to have the case heard and determined by the Magistrate, or in any case if it appears to the Magistrate that the offence is one which, owing to a previous conviction of the person charged, or from any other circumstance, ought to be made the subject of prosecution by indictment rather than to be disposed of summarily, such Magistrate shall deal with the case in all respects as if this Act had not been passed; but a previous conviction shall not prevent the Magistrate from trying the offender summarily, if he thinks fit so to do.

9.—If, upon the hearing of the charge, the Magistrate is of opinion that there are circumstances in the case which render it inexpedient to inflict any punishment, he may dismiss the person charged without proceeding to a conviction.

10.—When any person charged before a competent Magistrate with simple larceny, or with having obtained property by false pretences, or with having embezzled, or having feloniously received stolen property, or with committing larceny from the person, or with larceny as a clerk or servant, and the value of the property stolen, obtained, embezzled or received exceeds ten dollars, and the evidence in support of the prosecution is, in the opinion of the Magistrate, sufficient to put the person on his trial for the offence charged, such Magistrate, if the case appear to him to be one which may properly be disposed of in a summary way, and may be adequately punished by virtue of the powers of this Act, shall reduce the charge into writing and shall read it to the said person, and (unless such person is one who can be tried summarily without his consent) shall then put to him the question mentioned in section three, and shall explain to him that he is not obliged to plead or answer before such Magistrate at all, and that if he do not plead or answer before him, he will be committed for trial in the usual course.

11.—If the person so charged consents to be tried by the Magistrate, the Magistrate shall then ask him whether he is guilty or not of the charge, and if such person says that he is guilty, the Magistrate shall thereupon cause a plea to be entered upon the proceedings, and shall convict him of the offence, and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labor, for any term not exceeding twelve months, and every such conviction may be in the form C, or to the like effect.

12.—In every case of summary proceedings under this Act, the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined, by counsel or attorney.

13.—The magistrate before whom any person is charged under this act, may by summons require the attendance of any person as a wit-

ness upon the hearing of the case at a time and place to be named in such summons, and such Magistrate may bind by recognizance all persons whom he may consider necessary to be examined touching the matter of such charge, to attend at the time and place to be appointed by him, and then and there to give evidence upon the hearing of such charge; And in case any person so summoned or required or bound as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, then upon proof being first made of such person's having been duly summoned as hereinafter mentioned, or bound by recognizance as aforesaid, the Magistrate before whom such person ought to have attended may issue a warrant to compel his appearance as a witness.

14.—Every summons issued under this Act may be served by delivering a copy of the summons to the party summoned, or by delivering a copy of the summons to some inmate of such party's usual place of abode; and every person so required by any writing under the hand of any competent Magistrate to attend and give evidence as aforesaid, shall be deemed to have been duly summoned.

15.—The jurisdiction of the Magistrate in the case of any person charged within the Police limits of any city in Canada with therein keeping or being an inmate or an habitual frequenter of any disorderly house, house of ill-fame or bawdy-house, shall be absolute, and shall not depend on the consent of the party charged to be tried by such Magistrate, nor shall such party be asked whether he consents to be so tried; nor shall this Act affect the absolute summary jurisdiction given to any Justice or Justices of the Peace in any case by any other Act.

16.—The jurisdiction of the Magistrate shall also be absolute in the case of any person being a seafaring person, and only transiently in Canada, and having no permanent domicile therein, charged, either within the city of Quebec as limited for the purpose of the Police Ordinance, or within the city of Montreal as so limited, or any other seaport, city or town in Canada, where there is a competent Magistrate, with the commission therein of any of the offences mentioned in the second section of this Act, and also in the case of any other person charged with any such offence on the complaint of any such seafaring person whose testimony is essential to the proof of the offence, and such jurisdiction shall not depend on the consent of any such party to be tried by the Magistrate, nor shall such party be asked whether he consents to be so tried.

17.—In any case summarily tried under the third, fourth, fifth or sixth sub-sections of the second section of this Act, if the Magistrate finds the charge proved, he may convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned with or without hard labor for any period not exceeding six months, or may con-

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demn him to pay a fine not exceeding, with the costs in the case, one hundred dollars, or to both fine and imprisonment, not exceeding the said period and sum; and such fine may be levied by warrant and distress under the hand and seal of the Magistrate, or the party convicted may be condemned (in addition to any other imprisonment on the same conviction) to be committed to the common gaol or other place of confinement, for a further period not exceeding six months, unless such fine be sooner paid.

18.—Whenever the nature of the case requires it, the forms given at the end of this Act shall be altered by omitting the words stating the consent of the party to be tried before the Magistrate, and by adding the requisite words stating the fine imposed (if any) and the imprisonment (if any) to which the party convicted is to be subjected if the fine be not sooner paid.

19.—When any person is charged before any Justice or Justices of the Peace with any offence mentioned in this Act, and in the opinion of such Justice or Justices, the case is proper to be disposed of by a competent Magistrate, as herein provided, the Justice or Justices before whom such person is so charged, may, if he or they see fit, remand such person for further examination before the nearest competent Magistrate, in like manner in all respects as a Justice or Justices are authorized to remand a party accused for trial at any Court, under any general Act respecting the duties of Justices of the Peace out of Sessions, in like cases.

20.—No Justice or Justices of the Peace in any Province shall so remand any person for further examination or trial before any such Magistrate in any other Province.

21.—Any person so remanded for further examination before a competent Magistrate in any city, may be examined and dealt with by any other competent Magistrate in the same city.

22.—If any person suffered to go at large upon entering into such recognizance as the Justice or Justices are authorized under any such Act as last mentioned to take, on the remand of a party accused, conditioned for his appearance before a competent Magistrate under the preceding section of this Act, does not afterwards appear pursuant to such recognizance, then the Magistrate before whom he ought to have appeared, shall certify (under his hand on the back of the recognizance) to the Clerk of the Peace of the District, County or place (as the case may be) the fact of such non-appearance, and such recognizance shall be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *prima facie* evidence of such non-appearance.

23.—The Magistrate adjudicating under this Act shall transmit the conviction, or a duplicate of a certificate of dismissal, with the written charge, the deposition of witnesses for

the prosecution and for the defence, and the statement of the accused, to the next Court of General or Quarter Sessions of the Peace, or to the Court discharging the functions of a Court of General or Quarter Sessions of the Peace, for the District, County or place, there to be kept by the proper officer among the Records of the Court.

24.—A copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the Court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein, in any legal proceedings whatever.

25.—The Magistrate, by whom any person has been convicted under this Act, may order restitution of the property stolen, or taken, or obtained by false pretences, in those cases in which the Court before whom the person convicted would have been tried but for this Act, might by law order restitution.

26.—Every Court, held by a competent Magistrate for the purposes of this Act, shall be an open public Court, and a written or printed notice of the day and hour for holding such Court, shall be posted or affixed by the Clerk of the Court upon the outside of some conspicuous part of the building or place where the same is held.

27.—The provisions of the *Act respecting the duties of Justices of the Peace out of Sessions, in relation to summary convictions and orders*, and the provisions of the *Act respecting the duties of Justices of the Peace out of Sessions in relation to persons charged with indictable offences*, shall not be construed as applying to any proceeding under this Act, except as mentioned in section nineteen.

28.—Every conviction by a competent Magistrate under this Act shall have the same effect as a conviction upon indictment for the same offence would have had, save that no conviction under this Act shall be attended with forfeiture beyond the penalty (if any) imposed in the case.

29.—Every person who obtains a certificate of dismissal or is convicted under this Act, shall be released from all further or other criminal proceedings for the same cause.

30.—No conviction, sentence or proceeding under this Act shall be quashed for want of form; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it be therein alleged that the offender has been convicted, and there be a good and valid conviction to sustain the same.

31.—Nothing in this Act shall affect the provisions of the *Act respecting the Trial and Punishment of Juvenile Offenders*; and this Act shall not extend to persons punishable under that Act, so far as regards offences for which such persons may be punished thereunder.

32.—Every fine imposed under the authority of this Act shall be paid to the Magistrate, who has imposed the same, or to the Clerk of



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the Court or Clerk of the Peace, as the case may be, and shall be by him paid over to the County Treasurer for county purposes if it has been imposed in the Province of Ontario,—and if it has been imposed in any new district in the Province of Quebec, constituted by any Act of the Legislature of the late Province of Canada passed in or after the year one thousand eight hundred and fifty-seven, then to the Sheriff of such District as Treasurer of the Building and Jury Fund for such District, to form part of the said Fund,—and if it has been imposed in any other District in the said Province, then to the Prothonotary of such District, to be by him applied under the direction of the Lieutenant Governor in Council, towards the keeping in repair of the Court House in such District, or to be by him added to the moneys and fees collected by him for the erection of a Court House and Gaol in such District, so long as such fees shall be collected to defray the cost of such erection; and in the Province of Nova Scotia to the County Treasurer for county purposes, and in the Province of New Brunswick to the County Treasurer for county purposes.

33.—In the interpretation of this Act the word "property" shall be construed to include everything included under the same word or the expression "valuable security," as used in the *Act respecting Larceny and other similar offences*; and in the case of any "valuable" in the manner prescribed in the said Act.

34.—The Act cited in the first section of this Act, chapter one hundred and five of the Consolidated Statutes of Canada, is hereby repealed, except as to cases pending under it at the time of the coming into force of this Act, and as to all sentences pronounced and punishments awarded under it, as regards all which this Act shall be construed as a re-enactment of the said Act, with amendments, and not as a new law.

34.—This Act shall commence and take effect on the first day of January, in the year of our Lord one thousand eight hundred and seventy.

FORM (A)—See sec. 7.

*Conviction.*

Province of ——— City or ———, }  
as the case may be of, to wit: }

Be it remembered that on the ——— day of ———, in the year of our Lord ———, at ——— A. B., being charged before me the undersigned ———, of the said (City), (and consenting to my deciding upon the charge summarily), is convicted before me, for that he the said A. B., &c., (*stating the offence, and the time and place when and where committed*), and I adjudge the said A. B., for his said offence, to be imprisoned in the ——— (and there kept at hard labor) for the space of ———

Given under my hand and seal, the day and year first above mentioned, at ——— aforesaid.

J. S. [L. S.]

FORM (B)—See sec. 7.

*Certificate of Dismissal.*

Province of ——— City or ———, }  
as the case may be of, to wit: }

I, the undersigned, ———, of the City or as the case may be, of ———, certify that on the ——— day of ——— in the year of our Lord ———, at ——— aforesaid, A. B., being charged before me (and consenting to my deciding upon the charge summarily), for that he the said A. B., &c., (*stating the offence charged, and the time and place when and where alleged to have been committed*), I did, after having summarily adjudicated thereon, dismiss the said charge.

Given under my hand and seal, this ——— day of ———, at ——— aforesaid.

J. S. [L. S.]

FORM (C)—See sec. 11.

*Conviction upon a plea of not guilty.*

Province of ——— City or ———, }  
as the case may be of, to wit, }

Be it remembered that on the ——— day of ———, in the year of our Lord ———, at ——— A. B., being charged before me the undersigned ———, of the said City, (and consenting to my deciding upon the charge summarily) for that he the said A. B., &c., (*stating the offence, and the time and place when and where committed*), and pleading guilty to such charge, he is thereupon convicted before me of the said charge, and I adjudge him, the said A. B., for his said offence, to be imprisoned in the ——— (and there kept at hard labor) for the space of ———

Given under my hand and seal, the day and year first above mentioned, at ——— aforesaid.

J. S. [L. S.]

## SELECTIONS.

### PLAGIARISM.

The question, what is a legitimate use of an author's work, must depend on the circumstances of the particular case. As the Vice-Chancellor remarked in the latest case on this subject (*Pike v. Nicholas*, V.C.J.; 17 W. R. 842), a man publishing a book gives it to the world, and so far as it adds to the world's knowledge he adds to the materials which any other author has a right to use, and may even be bound not to neglect. In the case of dictionaries and similar publications wherein originality is necessarily excluded, the compiler is entitled, without exposing himself to a charge of piracy, to make use of preceding works, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction, as to produce an original result; provided he does not deny the use of such preceding works, and the alterations are not merely colourable (*Spiers v. Brown*, 6 W. R. 352). Merely to copy and re-arrange copyright matter is piracy (*Lewis*

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v. *Fullarton*, 2 Beav. 7); and it would seem that the only legitimate use which the compiler of such a work can make of previous works is for the purpose of verifying the correctness of his results (*Kelly v. Morris*, 14 W. R. 497, L. R. 1 Eq. 697; *Scott v. Stanford*, 15 W. R. 757, L. R. 3 Eq. 720).

The foregoing remarks apply to dictionaries, directories, statistics, and similar publications in which much of the contents must always be identical, if correctly given. In the cases where a compiler must of necessity make use of preceding books, the question will be whether he has made a legitimate use of them; bearing this in mind, that the question whether an author has made an unfair use of another work does not necessarily depend upon the quantity, but the value, of the pirated matter (*Bramwell v. Halcomb*, 3 My. & Cr. 786).

But the question before the Vice-Chancellor was not how much paste and scissor work the compiler of a dictionary or similar work may fairly have recourse to. The case takes us into higher fields of literary labour. The plaintiff was the author of an independent literary work, elaborated from a collection of materials, which must have been the result of great investigation and labour, and written in support of a certain theory. The defendant afterwards published a work, in the composition of which (as the plaintiff complained) he had availed himself of the plaintiff's investigations, and the results of those investigations, to the infringement of the plaintiff's copyright.

The Vice-Chancellor dealt with the case as if the defendant had openly borrowed from the plaintiff's book, and had acknowledged the same, instead of contenting himself with putting the plaintiff's book amongst the 168 authorities to whom he had referred. The omission to acknowledge his special obligation to the plaintiff's work made the case worse from a moral point of view, but did not affect the question before the Court. But to borrow without the author's leave arguments, theories, and ideas is a breach of his copyright, whether the words in which those arguments, theories, and ideas are clothed be taken or not. It was by no means a case of mere copying. No two passages in the books were absolutely identical: and the Vice-Chancellor acknowledged that no inconsiderable literary labour and skill had been displayed in the transfusion and transformation which he held to have taken place. The defendant, in the Vice-Chancellor's opinion, had adopted the general plan of the plaintiff's work, many of his arguments and illustrations, and the result of his investigations, and had also copied the plaintiff's references to works which he had in fact never consulted. "The question upon the whole is," said Lord Eldon, in *Wilkins v. Aikin* (17 Ves. 422), "whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work." The Vice-

Chancellor held that this was not a fair use by the defendant of the plaintiff's publication. If a man, instead of examining the original sources, or honestly exercising his mind on the work, avails himself of the labours of his predecessor, adopts his arrangement, borrows the materials which he has accumulated and combined together, or uses his language with colourable alterations or variations, he is guilty of piracy: *Jarrold v. Houlstone*, 3 K. & J. 716; and in the words of Judge Story (cited by Mr. Kerr in his work on Injunctions, p. 456, where this subject is fully treated of), the true test of piracy is to ascertain whether the defendant has in fact used the plan, arrangement, or illustrations of the plaintiff as the model of his own book, with colourable alterations and variations only to disguise the use thereof, or whether his work is the result of his own labour, skill, and use of common materials and common sources of knowledge open to all men, and the resemblances are either accidental or arise from the nature of the subject. This test being applied to the defendant's works, the Vice-Chancellor had no doubt whatever that it was, in the parts complained of, a palpable "crib" from the plaintiff's, though transposed, altered, and added to, and that with considerable skill. This systematic appropriation of the plaintiff's chain of reasoning, illustrations, and references to authorities amounted to an infringement of copyright, though no *verbatim* copying had taken place. It is true that the defendant had expended much skill and mental labour on what he had taken; yet the plaintiff had a right to say that no one had a right to take a substantial part of his work, and deal with it as he pleased, for the purpose of improving a rival publication.

Verbatim coying is the strongest evidence of an infringement of copyright; but the infringement lies in the appropriation of the ideas, and not in the transcription of the words. The real piracy here was of the theories and the arguments of the plaintiff. Once published, they became common property, subject to the author's right, as possessor of the copyright in his book, to restrain anybody from unfairly dealing with them. The case of *Pike v. Nicholas* shows the strictness with which the Court will protect authors against the most dangerous, because least easily dealt with, form of piracy—namely, the appropriation of thoughts and ideas. The Court can and does protect authors against those who rob them of the results of their invention and labours, whether the plagiarist simply transcribes their compositions or more insidiously "seizes their best thoughts, and as gipsies do with stolen children, disfigures them to make them pass for his own."—*The Solicitors' Journal*.

## NOVEL ARBITRATION—IN RE LAWSON BROTHERS.

[Insolv. Case.]

## NOVEL ARBITRATIONS.

Down to a very short time ago it was an invariable rule that, whatever cases might be settled or referred, there was one kind of case, at least, which could not be dealt with in either of these ways, or in any way whatever except the good old mode of a full trial in open court; and that was a case involving a charge of fraud. A man who brings an action against another founded upon an allegation of fraud, takes the most formal and the most public method that can be taken of charging him with the commission of a fraud. And it used to be well understood among all those conversant with judicial proceedings that such a charge must be met as deliberately and as publicly as it was made. No counsel would, for a moment, have entertained a proposal to refer or settle an action of deceit. And any judge would have been startled at the suggestion of such a thing. But in this as in other matters men have advanced with the times. At the last Guildhall sittings, as some of our readers may remember, in an action against Sir Edward Watkin and another gentleman for alleged frauds, Chief Justice Cockburn, a judge for the most part more than commonly sensitive upon such points, made the most determined efforts to have the case referred, though the firmness of the defendants or their counsel defeated the attempt, and they were rewarded by an unhesitating verdict in their favour. But during the late assizes several actions of fraud were referred by the consent of counsel and with the full approval of the judge, and we know not how many previous instances there may have been of the same thing.

How has this come to pass? How is it that what every honourable man would have recoiled from a very short time ago is done without hesitation to-day? Is it that character is less valued than it was? Is it that such words as dishonesty, misrepresentation, deceit, have from familiarity acquired a less ugly sound than they once had, so that a man can afford to leave it an open question, or a question to be settled by an arbitrator privately and at leisure, whether he is an honest man or not? To some extent there is reason to fear that this may be so. But this is certainly not the whole explanation of the case. The law itself has been to blame. A silent change has been long in progress, and has gradually given an opening, of which the eager alacrity in shirking their work habitually shown by many of the judges and many of the leaders of the bar has not been slow to take advantage. The process has been the usual one, that of pouring new wine into old bottles. Legal forms and legal terms have remained the same, but a new meaning has been infused into them, the law which they embody has changed. Every declaration for fraudulent misrepresentation still charges, as it always has done, that "the defendant falsely and fraudulently represented" so-and-so, which so-and-so was

false "as the defendant knew." And if judicial decisions can establish anything, there was a time, and not long ago either, when it was perfectly clear law that in order to sustain such a declaration, in other words, in order to establish any right of action for the misrepresentation, it was necessary to show the defendant's knowledge of its falsehood, and his intention to deceive. "Moral fraud" was the favourite expression. But it was soon held that to make a statement recklessly and without regard to its truth or falsehood was the same thing in law as to make it with knowledge of its falsehood. And, the thin edge of the wedge being thus inserted, it has been pushed further and further, until the old doctrine about moral fraud and actual knowledge has been practically frittered away. We are far from regretting the change; we think it a change decidedly for the better. We only desire to call attention to the confusion of landmarks which arises from concealing a change of substance by the retention of old forms and old names. What the law upon the subject is at this moment it might be difficult to define with accuracy. But it is clear that the term "fraud" now includes anything from the grossest swindling down to that which an ingenious counsel eager to hurry off to another case, and a judge anxious to escape a troublesome inquiry, when gracefully consigning the case to a reference, can describe to the jury and the newspaper reporters as "fraud in law," "fraud in the technical sense," involving nothing inconsistent with the strictest integrity or the highest honour.—*Solicitors' Journal*.

## ONTARIO REPORTS.

## INSOLVENCY CASES.

(Before the Judge of the County Court of the County of Wentworth.)

[Reported by S. F. Laxier, Esq., Barrister-at-Law.]

## IN RE LAWSON BROTHERS, INSOLVENTS.

*Insolvency—Deed of Composition and Discharge.*

*Held*, 1. That a deed of composition and discharge under sec. 9 of the Insolvent Act of 1864, purporting to be between the majority of the creditors of \$100 and upwards of the first part, and the insolvents of the second part, is valid, though the non-assenting creditors were not specially made parties to the deed.

2. A creditor who has accepted the terms of a deed of composition cannot afterwards contest the confirmation of the insolvents' discharge.

3. The debt of a secured creditor who has elected to accept his security in full of his claim, and obtained the consent of the assignee to such election, is not to be estimated in considering the amount of indebtedness.

[September 7th, 1869.]

This was an application by the insolvents to the Judge of the County Court of the County of Wentworth for a confirmation of the deed of composition and discharge made by the insolvents.

The sections of the deed in dispute were as follows:

"This deed of composition and discharge is made and executed in duplicate under and in

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pursuance of the Insolvent Act of 1864, and the Act amending the same, by and between the undersigned persons, parties, corporations and firms, being a majority in number of those of the creditors of John Lawson and Joseph Lawson (insolvents hereinafter named), who are respectively creditors for sums of one hundred dollars and upwards, and who represent at least three-fourths in value of the liabilities of the said insolvents (subject to be computed as in the said Acts provided) of the first part, and the said John Lawson and Joseph Lawson the said insolvents, trading and carrying on business by and under the name and style of Lawson Brothers, of the second part.

Whereas \* \* \* the majority in number of the insolvents' creditors for sums of one hundred dollars and upwards, representing at least three-fourths in value of the liabilities of the said insolvents, propose, and the said insolvents have assented and agreed to the proposal, that they, the said insolvents should compound for all their debts and liabilities at the rate of fifty cents on the dollar, such composition to be paid, and payable in six equal quarterly payments at three, six, nine, twelve, fifteen and eighteen months respectively from the date of these presents, and to be secured by the promissory notes of the said insolvents, payable respectively at the periods aforesaid at the Royal Canadian Bank, in the City of Hamilton, and endorsed by Edward Lawson of the City of Toronto, Merchant, and Thomas Lawson of Middlesex County, Farmer.

And the said parties of the first part do hereby agree, that such promissory notes of the said insolvents, amounting in the aggregate to a sum equal to the said composition of fifty cents on the dollar on the liabilities of the said insolvents so endorsed, and made payable as aforesaid, shall be, and be taken and accepted by the creditors of the said insolvents in full satisfaction and discharge of their respective claims \* \* \*

And the said insolvents covenant with each of the said parties hereto of the first part, to deliver the promissory notes so endorsed as aforesaid, and to deposit this deed with the Clerk of the County Court of the County of Wentworth for the benefit of all parties interested herein:—\* \* \* In Witness, &c."

The deed was signed by the insolvents and forty two creditors, including one secured creditor and six other creditors each having claims under \$100. A supplementary and amended schedule of creditors was also attached to the deed shewing the total number of creditors to be fifty two, and the total number of liabilities of the insolvents at \$54,881 65.

All the firms signed in the partnership name, and several of them by procuracy. One firm signed as follows: Wakefield, Coate & Co., per F. W. Coate.

A. Crooks, Q. C. and N. Kingsmill, for Geo. Winks & Co., J. G. Mackenzie & Co., W. J. McMaster & Co. and F. J. Clarkson & Co. opposed the confirmation of the insolvents' discharge, upon the grounds:—

1. That the deed is unequal in its provisions,

nor being made with the non-assenting creditors, and the non-assenting creditors being unable to sue upon the covenant made with the assenting creditors to deliver the promissory notes as provided for in the deed. The non-assenting creditors should have been made parties to the deed.

2. The deed is not proven to have been executed by the requisite number and proportion in value of creditors.

3. The authority of the agents who execute for their firms in the partnership name should be produced, and the partners should sign the deed in their individual names.

4. The secured claims should be estimated in ascertaining the number and value of the claims of those creditors who have signed the deed

*Ex parte Cockburn*, 9 L. T. 464; *ex parte Harris*, 9 L. T. 289; *Lindley on Partnership*, p. 228; *Duggan v. O'Connell*, 12 Ir. Eq 566, were cited in favour of these objections.

M. O'Reilly, Q. C., and S. F. Lazier, for the insolvents. Mackenzie & Co., McMaster & Co. and Clarkson & Co. have accepted the composition notes and the first payment in cash under the provisions of the deed, and are therefore estopped from disputing it. Winks & Co. have not proved their claim and cannot appear to oppose the insolvents' discharge until they file their claim. The objection of inequality in the provisions of the deed cannot be taken under sub-section 6 of section 9 of the Insolvent Act of 1864. There is in reality no inequality in this deed; and affidavits are filed shewing that the insolvents had furnished the Assignee with the composition notes for all the creditors (including Winks & Co.), and money for the first payment under the deed. *Blumberg v. Rose*, L. R. 1 Ex. 232; *Gresby v. Gibson*, L. R. 1 Ex. 112; *Rixon v. Emery*, L. R. 3 C. P. 546. The English Bankruptcy Act of 1861 is very different from the Canadian Insolvency Acts of 1864 and 1865.

Debts of secured creditors who elect to retain their securities with the consent of the assignees are not to be estimated in ascertaining the proportion in number and value of creditors who have signed the deed. Section 9, sub-sections 1 & 3, and sub-sections 4 & 5 of section 5 of the Insolvent Act of 1864.

The execution by any one partner of a deed of composition and discharge in the partnership name is sufficient, as any one of the firm can release the debt. *Lindley on Partnership*, p. 234. The affidavits of the principals that their agents had authority to sign for them are sufficient without production of the authority.

LOGIE, Co. J.,—Messrs. Crooks, Kingsmill & Cattinach appear for the following creditors, namely: Geo. Winks & Co., J. G. Mackenzie & Co., W. J. McMaster & Co., and T. J. Clarkson & Co., for the purpose of opposing the confirmation of the insolvents discharge.

Of these it appears by the affidavit of the official assignee, and by the production of the cheques for the cash payment indorsed by the creditors respectively, that the composition notes indorsed as provided by the deed, and cheques for the cash payment were sent to J. G. Mackenzie & Co., W. J. McMaster & Co., and T. J. Clarkson & Co., an apparently accepted by them, at least they have retained the notes and accepted the cash, and I think by so doing they are precluded

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IN RE LAWSON BROTHERS, INSOLVENTS.

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from now contesting the confirmation of the insolvents discharge.

Messrs. Geo. Winks & Co. have not proved their claim, and it is contended on their behalf that they have a right to appear and oppose the discharge—on the other hand it is urged that as they have not proved their claim, they are not to be considered as creditors, and have no right to oppose. I think under the Act of 1864 they have a right to come here and oppose. Sub-section 6 of section 9 provides, that “any creditor of the insolvent may appear and oppose” the confirmation of the discharge—and sub-section 5 of section 12 defines a creditor to mean “every person to whom the insolvent is liable, whether primarily or secondarily, and whether as principal or surety.” It is admitted that Messrs. Winks & Co. are creditors, the insolvents have inserted their claim in the schedule of their liabilities, and it appears by the affidavit of Joseph Lawson that cash for the first instalment and composition notes for the other instalments, pursuant to the terms of the deed, have been lodged in the hands of the official assignee for Messrs. Winks & Co. I think there can be no doubt as to their right to contest.

The confirmation of the discharge of the insolvents is opposed on the grounds:—

1st. That the insolvents have not procured the requisite proportion in value of creditors to execute the deed.

2nd. That the deed is unequal in its provisions.

Exception is taken to the execution of the deed by R. A. Hoskins & Co., John Macdonald & Co., and A. C. Sutherland & Co., on the ground that being executed by attorney or agent, there is not sufficient proof of the authority to execute, that the powers of attorney should be proved and produced. Even if these three claims are not included among those who assented, there would still be a sufficient proportion of creditors who have executed; but I think the proof of authority is sufficient. Affidavits made by John Macdonald, A. C. Sutherland, and a partner of Hoskins & Co., are filed—proving that the agents who executed for these creditors respectively had authority, and that their acts had been duly confirmed. All that is required, I think, is to satisfy the mind of the Judge with a reasonable degree of certainty that the deed was executed by a proper proportion of creditors, and that the same degree of certainty would not be necessary as on a trial between party and party. I hold, then, that proof of execution and of authority to sign is sufficient in all the cases. There are only two secured creditors, Marcus Holmes and H. A. Joseph, whose claims amount to \$4570 00, and it is contended by the opposing creditor that these claims should be included in estimating the amount of indebtedness and proportion in value of those who have executed. Sub-section 5, of section 5, provides for the case of creditors holding security, unconditionally they are creditors who may prove prior to any election to accept the security in satisfaction of their claims. But if the secured creditor elects to accept the security and not to prove, and the official assignee on behalf of the creditors assents to his retaining the security on these terms he certainly ceases to be a creditor who can prove, and his debt cannot be taken into consideration in estimating the amount of in-

debtedness. That is the case with these two secured creditors, they both elected to accept the securities they held, and not to prove, and it appears by the affidavit of the assignee that he has assented to the retention by them of their securities.

Exception is also taken to the execution of the deed by Wakefield, Coate & Co., on the ground that it is signed by one for the firm after the dissolution of the partnership, for the purpose of winding up the business and fulfilling engagements made during the existence of the partnership. Each partner has the same authority after dissolution to sign the name of the firm, and execute deeds of composition for debts due to the firm as he had before; Mr. Coate might have signed the name of the firm without signing for them in his own name. The execution by Wakefield, Coate & Co., is sufficient. (See Collyer on Partnership, Story on Partnership, 15 Ves. 227, 1 Taunt. 104.)

The next question to be decided by me, is, whether the deed of composition is unequal in its provisions. It is made between the *undersigned* parties, corporations, and firms, &c., of the first part, and the insolvents of the second part, and contains a covenant by the insolvents with the *parties thereto* of the first part, to deliver the notes mentioned in the deed on request, &c., the covenant being with the parties who have signed and not with the whole body of creditors, it is contended that those who have not executed the deed are not in as formidable a position as those who have, not being in a position to enforce the covenant, and *Ex parte Cockburn*, 9 L. J. Rep. 464, is relied on by the contesting creditor.

There is a wide difference between the English Bankruptcy Act of 1861, under which most of the decisions have taken place, and our Insolvent Act. The 187th section of the English Act contains this clause:—“And if the Court shall be satisfied that the deed has been duly entered into and executed, and that its forms are reasonable and calculated to benefit the general body of the creditors under the estate, it shall by order, &c.” There is no such clause in our Act, and there is a great deal of force in the argument of Mr. Lazier for the insolvents, that the grounds of opposition by creditors must be confined to those mentioned in sub-section 6 of section 9, and I think that under our Act the mere fact of the non-executing creditors not being so favourably placed as those who executed, would not be sufficient to avoid the deed or to refuse the confirmation, unless the inequality between the creditors or any other creditors of the insolvents amounted to a fraud upon any of the creditors or a fraudulent preference in favor of some of them. (If the statutes were alike the following cases would bear on this point: *Ilerton v. Castrique*, 32 L. J. C. P. 206; *Benham v. Broadhurst*, 34 L. J. Ex. 61; *Chesterfield Silk Co. v. Hawkins*, 34 L. J. Ex. 121; *Gresty v. Gibson*, L. K. 1 Ex. 112; *Reeves v. Walls*, L. R. 1, 2, 13, 412; *McLaren v. Bapier*, 36 L. J. C. P. 247; *Telley v. Wanless*, 36 L. J. Ex. 25; *Blumberg v. Rost*, L. R. 1 Ex. 232.)

In the case of the deed now under consideration, I think on the state of facts as shewn in the affidavits filed, and on examination of the deed itself, that there is no inequality between

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the assenting and non-assenting creditors, even under the English Act, and authorities cited. It may be true that the non-executing creditors could not sue on the covenant to deliver the notes; but the covenant has been fulfilled; money and indorsed notes for the composition, payable to all the creditors assenting and non-assenting, have been placed in the hands of the assignee, and with the exception of Winks & Co., all have received the money and composition notes to which they were entitled, and Messrs. Winks & Co., are entitled at any time to prove their claim and receive the money and notes held by the assignee for them. The insolvents have done all in their power to carry out the arrangement made with their creditors; the arrangement itself is fair and equal, and if there is any slight inequality between the assenting and non-assenting creditors, which I think there is not, it is only incident to the position of a non-assenting creditor. In *Blumberg v. Rose*, Pollock, C. B., says in his judgment—"It is impossible where there are two sets of creditors, assenting and non-assenting, but that there should be some degree of practical inequality. But to a deed equal in principle, inequality in effect is no objection."

The memorandum attached hereto shows that the insolvents have obtained the execution of the deed of composition and discharge by a majority in number representing three-fourths in value of the creditors whose claims are above \$100, and as the deed is fair, and the insolvents have complied with all the requirements of the act, I think they are entitled to the confirmation of their discharge.

#### Memorandum attached to the judgment.

Total number of creditors .....	52
Secured creditors who have accepted securities with consent of assignee .....	2
Creditors under \$100 .....	6 8
	44
No. of creditors over \$100 who have executed deed	35
Total liabilities of insolvents .....	\$51,831 65
Less secured claims as above .....	\$4,570 00
And claims under \$100 .....	318 49
	4,893 47
	\$10,233 42
Proportion of creditors required .....	\$37,675 07
Amount of unsecured claims over \$100 of those who have executed the deed .....	\$40,934 58
Proportion in value who have signed, deducting the claims of John Macdonald & Co., Sutherland & Co., and Hoskins & Co .....	\$38,449 71

### ENGLISH REPORTS.

#### CHANCERY.

##### BASKOMB V. BECKWITH.

*Vendor and purchaser—Specific performance—Suppression of facts—Plan of estate produced at sale.*

Where specific execution of a contract is sought, there must have been perfect truth and the fullest disclosures by the vendor in order to entitle him to relief. The Court will otherwise, even where there has been no intentional suppression of fact, relieve the purchaser who has been thereby deceived, provided he has acted throughout reasonably and fairly.

A building estate was offered for sale by auction, in plots, under conditions of sale which stipulated that no public house should be erected thereon. The defendant bought one of the plots and accepted the title, but refused to complete on discovering that the whole of the vendor's

estate, as had been the defendant's impression, was not included in the sale, but that a plot had been reserved, within one hundred yards of the defendant's purchase, to which the vendor contended the above stipulation did not extend. This impression was produced by the conditions of sale being framed as if including the whole estate without any reservation, and also by the reserve plot not being coloured or marked with the vendor's name. The defendant thereupon refused to complete, unless with covenants on the part of the vendor including the reserved plot; and in a suit for specific performance instituted by the vendor,

*Held*, that he could not compel the defendant to execute the contract if he, the plaintiff, insisted on retaining the plot free from any restrictive covenant; but that the plaintiff was entitled, at his option, either to a decree for specific performance with a covenant including the reserved plot, or to have his bill dismissed, and must in either case pay the costs of the suit.

[M. R., 17 W. R. 812.]

The plaintiff, George Henry Baskomb, who was the owner of the Manor House estate at Chislehurst, comprising thirty-five acres, on the 7th of May, 1867, put the greater part of the same up for sale by auction, divided into seventy-four lots. Lot 1 was the Manor House and grounds, of which the defendant became the purchaser.

The 11th condition of sale was to this effect:—"Each of the respective purchasers of building land at this sale shall in the deeds of conveyance to them respectively enter into covenants with the vendor not to build thereon otherwise than in conformity with the plan annexed to the particulars, and for the observance and performance of such conditions relative to the erection of fences modes of building on and using such lots as are mentioned in the general stipulations as to building land annexed to the particulars."

So far as is material, the general stipulations as to building were as follows:—"No purchaser to erect more than one single house, or two semi-detached, on his or their lot, or at a less value than £800 for the one, and £1,200 for the two. No house shall be used as a public-house or place of business or trade, and no trade or manufacture shall be carried on upon the property."

In August, 1868, the defendant discovered that a small adjoining piece of land at the junction of the Bromley and Greenwich roads belonged to the plaintiff, and was not included in the sale. This plot of land lay within one hundred yards of the Manor House gate.

The defendant accepted the vendor's title, but refused to carry into execution his contract unless the plaintiff would in the conveyance enter into covenants to observe the building stipulations not only with respect to the property comprised in the said particulars of sale, and in the plan of the property annexed to such particulars, but also with respect to the adjoining piece of land retained by the plaintiff and never offered for sale by him as building land.

The present suit was accordingly instituted by the vendor and his mortgagees. The plaintiffs charged that all the defendant was entitled to require was that the plaintiff should enter into covenants with him to require every purchaser from them of the building land mentioned in the particulars of sale to enter into qualified covenants restricting the same to such building land only.

The defendant submitted by his answer that when land is sold in lots subject to building stipulations the vendor is, as between himself and

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the purchaser of any one lot, in the position of a purchaser so far as regards other lots, and that if nothing but a covenant to require such covenants from purchasers were inserted in the deed of conveyance, its effect would be to allow the vendor himself to do that which he only stipulates to prevent others from doing, and that any equitable rights arising on the contract would be merged in or extinguished by the terms in the deed, which would be strictly construed.

The piece of land about which the dispute arose was not colored on the plan accompanying the conditions and particulars of sale, nor had it upon it the name of the owner, but it was colourless, like the adjoining property, which had upon it the name of Viscount Sidney. To a person who looked casually at the map, it would appear that the piece of land belonged to that nobleman. On a closer inspection of the plan it would appear to form part of a field divided into three lots, two of which were part of the property put up for sale. The defendant said in his answer "the piece of land so reserved by the plaintiffs was shown on the plan, but without being coloured, and in such a manner as to lead any person examining the plan to the conclusion that the same did not form part of the Manor House estate, but either belonged to Viscount Sidney or formed part of Chislehurst Common, and I myself had no idea from the inspection of the plan that the piece of land belonged to the plaintiffs."

Mr. R. C. Driver, of the firm of Messrs. Driver, surveyors, of Whitehall, deposed that it is a frequent occurrence to reserve a few plots on the sale of a building estate, in order that they may be free from any building stipulations or covenants, and that it is not the usual practice of surveyors to mark the name of the vendor on any piece of land reserved from a sale.

It appeared that there had been some intention on the part of the plaintiff to erect a public-house on the plot in question. At any rate, it was looked on as a capital site for a public-house by the plaintiff.

*Sir R. Baggallay and Jason Smith* were for the plaintiff.

*H M Jackson (Jessel, Q.C., with him)* for the defendant.

*White v. Bradshaw*, 16 Jur. 788; *Duke of Beaufort v. Neeld*, 12 Cl. & Fin. 248; *Lukey v. Higge*, 3 W. R. 306; and *Webster v. Cecil*, 30 Beav. 62, were referred to.

**LORD ROMILLY, M.R.**—The question is this—is the defendant bound to complete the contract, leaving the plaintiffs at liberty to erect any building he pleases on the ground, or use it for any purpose whatever? I think that he is not so bound. I am of opinion on the evidence that he bought the property in the firm belief that no public-house or place of trade could be built on any part of the plaintiffs estate. [His Lordship then referred to the correspondence as confirming the statement of the defendant to this effect, and continued:—] This shows clearly that in April, 1868, the defendant laid great stress on the fact that there was to be no public house on the estate; and as on all sides the estate was bounded by Chislehurst Common, Viscount Sidney's estate, and the glebe of the rector of Chislehurst, it was reasonably certain that no

public-house could be placed with any injurious proximity to the residence of the defendant if it was not on the plaintiffs estate. In the next place no intimation was given to the defendant that the covenants would not include everything until August, 1868.

It is said on behalf of the plaintiffs that the premises were inspected, and that the opposite field was made the subject of enquiry and discussion; that it was seen to be one enclosure, and they who looked at it must have perceived that the plot which was excepted from the sale formed part of this field, and that it formed part of the property put up to auction. This does not remove the fact which is sworn to that up to August, 1868, the defendant and his advisers believed that the covenant would override the whole property of the plaintiffs at Chislehurst.

Another circumstance has great weight with me. It is the fact that nothing in the shape of colour or of the name of the proprietor appears on this plot to mark that it was part of the vendor's estate. The surveyors, Mr. Clark, Mr. Fox, and Mr. Driver, state that it is a common occurrence for a few plots to be reserved on the sale of a building estate, in order that they may be free from the restrictive covenants, and that it is not the usual practice of surveyors to mark the vendor's name on every plot reserved from the sale. I have no doubt of the truth of the evidence before me, nor do I remember to have seen a case, where the vendor proposes to print the names of the adjoining owners, but omits to print his own as an adjoining owner on a plot of land which belongs to him, and does not by the color point out that it belongs to the estate of the vendor, though it be not included in the sale. It is obvious that it would, comparatively speaking, be a slight matter to the defendant if a public house were built at the southern extremity of this property, distant about a third of a mile in a straight line from the Manor House. Yet this distant part of the property is carefully included in and governed by the covenant, while on the high road, which passes in front of the defendant's house at the distance of one hundred yards, a public-house might be established in a neighbourhood where obviously there could not be many, and which seems to be admirably situated for that purpose, at the junction of three roads, and which, therefore, would probably become a place of great and constant resort. If it had been expressly stated in the conditions that the vendor reserved this plot for the purpose of erecting thereon a public-house, I cannot doubt but that it would have had a very injurious effect on the sale of all the lots near to it, and have seriously diminished the prices bid for them. I think that the defendant bought the Manor House in the firm persuasion that no such use was to be made of such plot of ground; and that the acts of the plaintiffs' agent in passing the conditions of sale as if including the whole estate without any reservation, and so framing and colouring the plan as to contribute to that belief, are such that the plaintiffs cannot now compel the defendant to execute the contract if they, the plaintiffs, insist on retaining this plot free from any restrictive covenant whatever.

I think that the defendant cannot prevent the plaintiffs from so retaining and using this plot of

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IN RE BROOKMAN'S TRUSTS—RE PHILLIPS (A LUNATIC).

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land; but that if they do so they cannot compel the defendant to complete the contract. I think that the plaintiffs are entitled at their option either to a decree for specific performance with a covenant including this reserved plot, or to have their bill dismissed. In either case the plaintiff Baskcomb will have to pay the costs of the suit, as the case has, in a great measure, been the consequence of the peculiar manner in which the map and conditions of sale are drawn up. It is of the greatest importance that it should be understood that there should be perfect truth and the fullest disclosures in all cases where specific performance is required; and if this be not so, even if there have been no intentional suppression of facts, the Court will grant relief to the man who has been thereby deceived, provided he has acted throughout reasonably and fairly.

#### *In re BROOKMAN'S TRUSTS.*

*Will—Marriage articles—Covenant to devise—Interest vested or contingent.*

Marriage articles contained a covenant to devise by will certain property to such child or children as should attain twenty-one, and in default, to the wife, her heirs, and administrators. The property was duly devised by the will according to the covenant, with a direction that if there should be no child who should attain a vested interest, the property should go to the next of kin of the wife. There was one child who attained twenty-one and died in the lifetime of the testator.

*Held*, that the child took a vested interest on attaining twenty-one.

[V. C. M., 17 W. R. 818.]

Articles were executed on the marriage of Mr. and Mrs. Violett by which Thomas Brookman covenanted that if his daughter, Mrs. Violett, survived him, he would devise to trustees a portion of his property for the use of Mr. Violett for life, or until bankruptcy or insolvency; remainder to the use of Mrs. Violett for life; remainder to the use of their children as Mr. and Mrs. Violett, or the survivor of them, should appoint; and, in default of appointment, to the children equally, with the benefit of survivorship in case any died under twenty-one; and, if there should be only one who should attain twenty-one, to such child, his or her heirs and assigns; and, if there should be no children, or if all should die under twenty-one without leaving issue, to the heirs and administrators of Mrs. Violett.

Thomas Brookman made his will in 1840, and devised the property in accordance with the articles, but the will contained these words,—"In case by reason of the failure of issue of Mrs. Violett there should be no person who under the limitations hereinbefore contained shall attain a vested interest." The testator in that case gave the property to the next of kin of Mrs. Violett at the time of the failure of issue.

One child only attained twenty-one, and died in 1847 intestate. The testator died in 1849. In 1850 Mr. Violett became insolvent. Mrs. Violett died in 1868.

The trustees had paid the fund into court under the Trustee Relief Act.

Mrs. Violett's next of kin presented this petition to have the fund paid to them.

*Harby, Q. C.*, and *Everitt*, for the petitioners, contended that as the child died in the lifetime of the testator its interest was not vested; *Jones*

*v. How*, 7 Ha. 267; *Eyre v. Monro*, 5 W. R. 870, 8 K. & J. 805; *Kay v. Crook*, 5 W. R. 220, 8 Sm. & Giff. 417; *Jones v. Martin*, 5 Ves. 285 n.

*Glasse, Q. C.*, and *Jason Smith*, for the assignees of Mr. Violett, who claimed as next of kin of the deceased child, contended that the object of the articles was to provide for the issue of the marriage who took a vested interest. The testator had reserved a power of disposition over the property during his life by deed. There must be a vested interest in the children other than those who survived the testator. Child meant any child of the marriage, not those only who survived the testator. Trusts were declared by the articles in the same way as if a settlement had been executed.

*Speed*, for the surviving trustee.

*MALINS, V. C.*, said he thought the articles bound the testator to leave the property in such a way as that any child or children who attained twenty-one should take a vested interest. This property must therefore be considered to have vested in this child on its attaining twenty-one. The assignees must take out administration to the child's estate, and on so doing are entitled to the fund in court.

#### *RE PHILLIPS (a Lunatic).*

*Lunacy—Practice—Mortgage to lunatic—Re-conveyance—Costs of mortgagor.*

Where the committee of a lunatic mortgagee presents a petition that he may be appointed to re-convey the mortgaged estate to the mortgagor, the mortgagor, even though served with the petition, is not entitled to his costs out of the lunatic's estate.

[17 W. R.]

This was a petition in lunacy by Thomas Phillips, the committee of the estate of William Phillips, who was duly found a lunatic by inquisition on the 6th March, 1868.

By a report of one of the Masters of Lunacy it was found that the fortune of the lunatic consisted (*inter alia*) of an absolute interest in certain mortgage and other securities.

The mortgages were about to be paid off, and this petition prayed that the petitioner might be appointed to convey the respective mortgaged properties to the respective mortgagors at the expense in each case of the mortgagors.

The mortgagors were served with this petition. This petition was heard on the 4th June, when an order was made according to the prayer, and that the costs of all parties should be paid out of the lunatic's estate.

*Badnall*, for one of the mortgagors, now mentioned the matter again to the Court, and stated that, having regard to the authorities, there was some doubt whether the costs of the mortgagors ought to be paid out of the lunatic's estate, even though they had been served with the petition. He referred to *Re Wheeler*, 1 D. M. & G. 434; *Re Biddle*, 28 L. J. Ch. 28.

*GIFFARD, L. J.*, referred to *Re Rowley*, 11 W. R. 297, 1 D. J. & S. 417, where in a similar case the Lords Justices directed a mortgagor's costs to be paid out of a lunatic's estate, but intimated their opinion that in future mortgagors ought not to be served with such a petition. His Lordship said that he had a strong opinion that the mortgagor's costs ought not to be paid by the



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mortgagee, and he desired to have it understood as the settled rule for the future in cases of this kind that a mortgagor, whether served or not, should have no costs out of the lunatic's estate. Under no circumstances ought a mortgagee to bear his mortgagor's costs.

#### BULTEEL V. PLUMMER.

*Marriage settlement—Power of appointment—Will—Defective execution of power.*

Under a marriage settlement the survivor of the husband and wife had power to appoint by will to the children of the marriage and the issue of any child who should be dead. One of the children died in the lifetime of the parents, leaving issue. The wife survived the husband, and by her will made appointments in favour of her children and one of her grandchildren, and made one of her children also residuary legatee. It was admitted the power was not an exclusive one.

*Held*, that so much of the property subject to the power as was comprised in the residuary bequest was unappointed and divisible among the children of the marriage and their representatives.

[V. C. M., 17 W. R. 1058.]

By the marriage settlement of Mr. and Mrs. Plummer, dated in 1809, certain real and personal property was vested in trustees in trust for the husband and wife for life, and upon their decease for the children of the marriage, and the issue of any child then dead as the husband and wife, by deed jointly, or the survivor of them, by will, should appoint; and in default of appointment, for individuals of the same class equally. There were five children of the marriage, one of whom attained twenty-one and died a bachelor in the lifetime of Mr. and Mrs. Plummer; another, George Robert Plummer, also died in the lifetime of Mr. and Mrs. Plummer (leaving four children, three of whom survived Mr. and Mrs. Plummer and were living); Henry Plummer; Frances Plummer, a spinster; and Mrs. Westmacott. Mrs. Plummer survived her husband many years, and died in 1867, having by her will in pursuance of the aforesaid power appointed out of the trust property a certain freehold house to Frances Plummer, £2,500 stock to Mrs. Westmacott, £500 to Henry Plummer, and £100 to Maria, one of the four children of G. R. Plummer, she then gave and appointed all the residue of her property to Frances Plummer. The bill was filed by the trustees of the settlement of 1809, to obtain the decision of the Court on the validity of the appointments. It was admitted on all sides that the power in the settlement of 1809 was not an exclusive power of appointment.

*Glass, Q. C., and Waugh*, for the plaintiffs.

*Pearson, Q. C., and Langley*, for Frances Plummer, contended that the appointments other than the residue were good. They cited *Coven-try v. Coventry*, 2 P. W. 222; *Colson v. Colson*, 2 P. W. 478; *Wilson v. Piggott*, 2 Ves. Jun. 351; *Rowley v. Rowley*, Kay, 242; *Ranking v. Barnes*, 12 W. R. 565, 10 Jur. N. S. 468; *Trollope v. Routledge*, 1 DeG. & Sm. 662; *Warde v. Firmin*, 11 Sim. 235.

*Cole, Q. C., and Key*, for Mrs. Westmacott, supported the same view, and contended that where there were two appointments made by separate instruments, one good and one bad, the good one was allowed to stand; so if the two appointments were made by one instrument, as

in this case, though, as a general rule, the whole would be void, yet it would be not so here, as the appointments in this case were so distinguishable and separate: *Young v. Waterpark*, 18 Sim. 202; *Topham v. Portland*, 12 W. R. 186, 1 D. G. J. & Sm. 517.

*Cotton, Q. C., and Bedwell*, for the children of G. R. Plummer other than the legatee of £100, contended that as Mrs. Plummer's will was an appointment to some of the objects of the power in exclusion of others, it was a bad execution of the power, and the trust property should therefore be divided amongst the objects of the power as in default of appointment.

*MALINS, V. C.*, said the testatrix's intention was fairly to exercise the power,—there was no undue influence, no fraud. He should endeavour, as far as possible, to carry into effect her intention, by declaring all the appointments good except that of the residue of the trust fund contained in the residuary gift to Frances Plummer: such residue only was unappointed and divisible into fifths among the five children of the marriage, to be paid to them or their representatives.

### UNITED STATES REPORTS.

#### COULTER ET AL. V. BORTNER ET AL.

(From Philadelphia Legal Gazette)

Where a testatrix bequeathed personal property to a trustee "to apply it to the maintenance and support of Ann Coulter, her husband and family, as in his opinion is fit, at such times and in such amounts as he may determine and the same not to be at any time liable to the debts or contracts of the said Josiah Coulter, in any way or manner whatever," and the trustee took a conveyance of a tract of land to himself "in trust for the use of Ann Coulter, with Josiah Coulter and family," and placed them on the land, where they resided until her death.

*Held*, that the trust was a valid one, that there was no conveyance of the land, or delivery of the personality to the cestui que trust by the trustee, and that a conveyance of the land in fee simple by Josiah Coulter and wife was invalid, and passed no title to the vendee.

[Legal Gazette, Sept. 10, 1869.]

Case stated.

Opinion by TRUNKY, P. J.

The estate of Margaret Campbell consisted of personal property. By her will, Moses Jenkins was appointed executor, and the property given to him as trustee. He took a conveyance, dated March 30th, 1825, of a tract of land in payment of a debt owing to the estate, to himself, as executor of the estate of Margaret Campbell, deceased, in trust for the use of Ann Coulter, with Josiah Coulter and family, and immediately placed them on said land, where she resided until her decease in October, 1867. On May 12th, 1867, Josiah Coulter and wife executed a fee simple deed for thirty acres, part of said tract, to Philip Bortner; a part of the consideration being the note upon which this action is founded. Had they power to convey the land?

The testatrix gave the legal title to the estate to the trustee, who was to perform certain duties for the objects of her bequest. Absolute control over the estate is given him, with power "to apply it to the maintenance and support of Ann Coulter, her husband and family, as in his opinion is fit, at such times and in such amounts as he may determine, and the same not to be at any time liable to the debts or contracts of the said

U. S. Rep.]

COULTER ET AL. V. PLUMMER ET AL.

[U. S. Rep.]

Josiah Coulter in any way or manner whatever."

A special trust is given to Moses Jenkins, to hold for the use and support of a married woman. This is the motive, and to carry it out the will creates an action and operative trust, not a mere passive or technical one. Since the decision in *Barnett's Appeal*, 10 Wright, 892, there has been no question as to the validity of such trusts, when for the benefit of others as well as *femes covert*. Although personal estate, it cannot be taken from the trustee—his right and duty are to hold and use it as directed by the will. Where a testator devised an estate to his executors in trust, to invest in stock, or put it at interest and apply the income to William Wilson's use, or pay him the whole or part of the principal at their discretion, it was held that William Wilson, or his committee, he having been found a lunatic, had no right to demand and take the money or trust out of the hands where the testator had placed it, the testator had a right to appoint his own trustee. *Wilson's Estate*, 2 Barr, 329.

Words in a will, which in relation to land would create an estate tail, give an absolute right to chattels. 11 Harris, 10, 388; 6 Casey, 118, 180. But in this will there is no right of possession given save to the trustee—no power of disposition in the *cestui que trust*—no right of control, unless the trustee in his discretion, determines to give her the property. No one, as of right, could demand any portion of the estate from the trustee beyond such sums from time to time as were necessary for the support of Ann Coulter and family. To this extent, and no farther, was it the trustee's duty to pay. Anything more would be a moral, if not legal violation of the directions in the will. Had he in 1825, or within many years afterwards, given this personal estate to Ann Coulter, it would at once have vested in Josiah Coulter, and have been liable for his debts and contracts, the very thing expressly prohibited.

It was conceded in argument, and correctly, that by reason of prohibition as to Josiah Coulter, no estate vested in him while the trust remained unexecuted. The use was in Ann Coulter, and the trustee could have given her the money in her lifetime if he had thought best, for such is the power. Had he so determined, in good faith, the "family," after her decease, would have no claims upon him. "The word family, when applied to personal property, is synonymous with kindred or relations. This being the ordinary acceptation of the word family, it may nevertheless be confined to particular relations by the context of the will, or the term may be enlarged by it, so that the term may in some cases mean children, or next of kin, and in others may even include relations by marriage."—*Bouvier's Law Dict.* I cannot doubt the word family in this will means children. Perhaps the children of Ann Coulter, as the equitable owners of the estate, whether it be real or personal, are now entitled to its possession, control, and disposition, but this is not material to the question.

The trustee took a conveyance of the land in trust as executor of the estate; he holds it for the purposes and uses stated in the will. He could have been compelled to account for the

money invested in this land. The power was not given him, and he had not the legal right to convert personal into real estate. The *cestui que trust* was not bound to acquiesce in such conversion for over forty years. She, with her husband and family, immediately went on the land, and have used it and occupied it as they only could have done had the testatrix owned it at the time of her decease, so that by the will it could have vested in the trustee for her use. Instead of such acquiescence and use, she could have refused and demanded of, and compelled the trustee to pay her the money necessary for her support. The trustee invested the personal estate to the satisfaction of the *cestui que trust*, so that it was not liable to the debts or contracts of Josiah Coulter, so that she, her husband and family, received the use for their support. Being so long acquiesced in she has the equitable right to the real estate, and without doubt she, if living, or having deceased, her heirs can elect to keep it. She could not dispose of it, however, during coverture, for it is well settled that a married woman cannot convey an estate vested in a trustee for her sole and separate use, unless authorized to do so by the instrument creating the trust. After the death of the husband she may convey.

In reference to the duties of Jenkins, as trustee no reason exists why he should have conveyed the land to Ann Coulter. If it was not his duty to give her the money when not required for her support, certainly it was not to give her the legal title to the land purchased with the money. No presumption even arises that a conveyance was made by a trustee when it was not his duty to convey. Had he conveyed the legal title to her in 1825, a life-estate would have vested in her husband, liable for his debts and contracts.

The trustee holding the legal title for the uses, expressed in the will, permitted the *cestui que trust* to occupy the land. If, at any time becoming dissatisfied, she should refuse to occupy, she could not hold it on other terms; nothing but the act of the trustee, as in his opinion he should determine and think fit, could vest the money absolutely in Ann Coulter, or the land as the equivalent for the money. He never gave the one nor conveyed the other.

Whether the land, purchased with the trust funds, stands in the place of, and passes as personal estate, in the hands of the trustee held under the will, or as real estate conveyed to a trustee for the separate use of a married woman, the conclusion is the same, that Josiah Coulter and wife had no power to give a good title for the land attempted to be conveyed to Philip Bortner, and on the case stated, judgment must be entered for defendants.

In an English case it was lately decided in the Court of Exchequer, that a creditor who takes from his debtors agent on account of the debt the cheque of the agent, is bound to present it for payment within a reasonable time, and if he fails to do so and by this delay alters for the worse the position of the debtor, the debtor is discharged, although he was not a party to the cheque.

## DIGEST OF ENGLISH LAW REPORTS.

## DIGEST.

## DIGEST OF ENGLISH LAW REPORTS.

(Continued from page 58.)

FOR NOVEMBER AND DECEMBER, 1866, AND JANUARY, FEBRUARY, MARCH, AND APRIL, 1869.

## ACTION.

The plaintiff, in common with other inhabitants of a district, enjoyed a customary right to have water from a certain spout. The defendant, being the owner of the land through which came the stream supplying the spout, on various occasions prevented sufficient water reaching the spout to supply the inhabitants. The plaintiff, however, had never suffered any actual inconvenience. *Held*, nevertheless, that the plaintiff could maintain an action for diverting the water, on the ground that the defendant's acts might furnish evidence in derogation of his rights. *Harrop v. Hirst*, Law Rep. 4 Ex. 48.

See BILL OF LADING; MONEY HAD AND RECEIVED.

ADMINISTRATION—See CONFLICT OF LAWS; EXECUTOR AND ADMINISTRATOR, 2; NULLITY OF MARRIAGE; PRINCIPAL AND SURETY, 1; TRUST, 1; WILL, 5.

ADULTERY—See DIVORCE, 2-4; INJUNCTION, 5.

ADVANCEMENT—See HUSBAND AND WIFE, 4.

AGENT—See PRINCIPAL AND AGENT.

AGREEMENT—See CONTRACT.

ALIEN—See COPYRIGHT, 1.

## ALIMONY.

1. Alimony *pendente lite* was allotted on the average annual earnings of a husband, a master mariner, though at the time of his answering the petition for alimony he was temporarily out of employment.—*Thompson v. Thompson*, Law Rep. 1 P. & D. 558.

2. Where husband and wife have been living apart for many years, and the wife has supported herself, and is still able to do so, alimony *pendente lite* will not be allowed.—*Burrows v. Burrows*, Law Rep. 1 P. & D. 554; *George v. George*, *Id.*

See DIVORCE, 3.

ANCIENT LIGHT—See LIGHT.

APPEAL—See COSTS; INJUNCTION, 6.

APPORTIONMENT—See MORTMAIN; TENANT FOR LIFE AND REMAINDER MAN.

APPRENTICE—See MASTER AND SERVANT.

APPROPRIATION—See BANKRUPTCY, 4, 6.

ARBITRATOR—See AWARD.

## ARREST.

A person accused of crime, who attends under his recognizances at the hearing of the charge against himself, is privileged from arrest on civil process during his return home, after having been remanded on bail.—*Gilpin v. Cohen*, Law Rep. 4 Ex. 181.

## ASSIGNMENT.

A builder assigned to T. £200 of what should be coming to him under a contract with A. The contract provided that if the building was not finished on a certain day, A. might employ another builder to complete it. When the assignment was made, the time for completion had expired. Soon after the builder conveyed his property to a trustee for the benefit of his creditors, and the trustee completed the building with his own money, and was repaid by A. Allowing this repayment as proper, nothing remained due on the contract. T. then filed his bill against A. to enforce payment of the £200. *Held*, that the payment by A. to the trustee was proper, and that the bill should be dismissed.—*Tooth v. Hallett*, Law Rep. 4 Ch. 242.

See CONVERSION; COVENANT, 3; MORTGAGE, 1; PARTNERSHIP, 2.

## ATTORNEY.

1. The plaintiff recovered a verdict for 25*l.* against the defendant. The plaintiff's attorney informed the defendant's attorney that he had a lien for costs to a large amount on the damages recovered by the plaintiff. Subsequently, a rule *nisi* for a new trial was granted on the ground that the verdict was against evidence. The plaintiff and defendant, without the knowledge of their attorneys, settled the action, the defendant paying 10*l.* to the plaintiff, who was very poor, in discharge of all claims for damages and costs. *Held*, that the plaintiff's attorney was not entitled to compel the defendant to pay his costs, as the result of the proceedings was doubtful at the time of the settlement, and there was, therefore, no existing fund on which the lien for costs had attached, and as the settlement was not shown to be fraudulent.—*Ex parte Morrison*, Law Rep. 4 Q. B. 153.

2. Where a solicitor is not the general agent of his client, so as to be able to receive the client's money at all times without his knowledge, but has only received money for him in respect of separate transactions, and his client was aware of these at the time, and knew what was to be received, the solicitor is entitled to have his bill for costs paid, though he has not kept accounts of all the money received.—*In re Lee*, Law Rep. 4 Ch. 48.

## DIGEST OF ENGLISH LAW REPORTS.

3. The plaintiff in a suit became bankrupt, and the suit was revived by his assignee, who employed a different solicitor. A decree was afterwards made. *Held*, that the solicitor of the original plaintiff must produce the documents in his possession which were necessary for drawing up the decree, notwithstanding his lien on them for costs, though the documents were not strictly in evidence in the case.—*Simmonds v. Great Eastern Railway Co.*, Law Rep. 3 Ch. 797.

4. An attorney who has been discharged by his client can set up a lien for costs as a reason for not producing or delivering up the papers on which he claims the lien, though his client be thereby embarrassed, and this lien extends to all costs due him from the client. *Secus*, if the attorney discharges himself. *In re Faithful*, Law Rep. 6 Eq. 325.

See CONTEMPT, 1; HUSBAND AND WIFE, 2; LUNATIC, 1.

AVERAGE—See INSURANCE, 2.

## AWARD.

1. Evidence of an arbitrator is admissible in explanation of his award, and if it appears that he has mistaken either the subject matter referred to him, or the legal principle affecting the basis on which the award is made, the award will be set aside or referred back to him.—*In re Dare Valley Railway Co.*, Law Rep. 6 Eq. 429.

2. *Semble* (*per KELLY, C.B., MARTIN and CHANNELL, BB.*), that it may be shown by the evidence of an arbitrator that the award includes an amount for something over which he had no jurisdiction.—*Duke of Buccleuch v. Metropolitan Board of Works*, Law Rep. 3 Ex. 806.

3. The plaintiff agreed to row a race with K., each to deposit a stake with the defendant, and "the decision of the referee to be final." There was a default in the start, and the referee ordered K. to inform the plaintiff that, if he did not start, K. was to row over the course without him. K. rowed over the course without communicating this order to the plaintiff or giving him any opportunity to start, and the referee, without any injury, ordered the stakes paid to K. *Held*, that the referee's order was conditional on its being communicated to the plaintiff; that, never having been communicated, there never was such a start or race as was contemplated; that, therefore, the referee's jurisdiction to award the stakes had not attached; that his decision was not final; and that the plaintiff was entitled to recover

his deposit from the defendant.—*Sadler v. Smith*, Law Rep. 4 Q. B. 214.

BAILMENT—See COLLISION, 4.

BANK—See INTEREST, 2.

BENEFIT SOCIETY—See FRIENDLY SOCIETY.

BILL OF LADING.

The assignees for value of a bill of lading can sue ship-owners in the admiralty for neglect in properly carrying the goods, on the grounds, (1) under 24 Vic. c. 10, s. 6, and 18 & 19 Vict. c. 111, s. 1, of breach of contract; (2) under the former section, of negligence.—*The Figlia Maggiore*, Law Rep. 2 Adm. & Ecc. 106. See FREIGHT, 2, 4; SALE, 1.

BILLS AND NOTES.

1. *Semble*, that the following document: "July 15, 1865. On 1st of August next, please pay to A. or order £600, on account of moneys advanced by me to the S. company. To Mr. W., official liquidator of the company," is a negotiable bill of exchange.—*Griffin v. Weatherby*, Law Rep. 3 Q. B. 753.

2. The following promissory note was signed by the secretary of a corporation: "On demand, I promise to pay A. fifteen hundred pounds. For Mistle Railway Company. John Sizer, secretary." *Held* (*per KELLY, C. B. and PIGOTT, B.; CLEASBY, B., dubitante*), that John Sizer was not personally liable.—*Alexander v. Sizer*, Law Rep. 4 Ex. 102.

3. The directors of a company gave to J. H., for value, an instrument under the company's seal, headed "debenture," by which the company "undertake to pay to the order of J. H., on 1st July, 1867," £1,000, with interest half-yearly, on presentation of the annexed coupons. *Held*, that an indorsee for value of this instrument was entitled to prove on it against the company free from equities between H. and the company. *Semble*, that the instrument was a promissory note.—*In re General Estates Co.*, Law Rep. 3 Ch. 758.

4. One who takes up an accepted bill *supra* protest for the honor of the drawer can sue the acceptor, and the acceptor cannot plead in defence a right of set-off against the drawer.—*In re Overend, Gurney & Co. ex parte Swan*, Law Rep. 6 Eq. 344.

5. A bank, the holder of a bill of exchange at maturity, commenced actions against B., the acceptor, and C., an indorser. On March 21, C. paid the amount due, and proceedings were ordered to be stayed in the action against him on payment of costs; these were paid on April 18, and the bank then gave the bill to C., who delivered it to the plaintiffs in payment of a debt due from him. Judgment was

## DIGEST OF ENGLISH LAW REPORTS.

signed in the action against B. on March 8, and a *ca. sa.* lodged with the sheriff on March 6. On March 29, B. was arrested, and discharged the same day by order of the bank, on payment of costs. The plaintiffs having sued B. on the bill, *held*, that C. had a vested right of action against B. on C.'s payment of the bill on March 21, for the fact that C. had not paid the costs on March 21 only gave the bank a lien on the bill, but did not affect C.'s right to a remedy on the bill; that neither the taking on execution nor discharge of B. could take away C.'s right, and that therefore the plaintiffs could recover.—*Woodward v. Pell*, Law Rep. 4 Q. B. 55.

See GIFT; GUARANTY; INTEREST, 1, 2; ULTRA VIRES, 1.

## BOND.

1. A. made his will. Shortly after, B. gave A. a bond for £8,000, conditioned to be void if B. should pay £4,000, with interest, within three months after his taking an absolute interest in the residue given by A.'s will, the interest being contingent on A.'s son dying without issue, B. surviving. *Held*, that interest was due on the bond only from the time when B. acquired a vested interest in the residue.—*Mathews v. Keble*, Law Rep. 8 Ch. 691.

2. A testator charged the share of a residuary legatee with money due to him from the legatee on the security of a bond, and all interest thereon. *Held*, that the whole debt and interest, though they exceeded the penalty of the bond, must be deducted from the share.—*Ib.*

See BILLS AND NOTES, 8; BOTTOMRY BOND.

## BOTTOMRY BOND.

1. A ship, with a cargo of mahogany for England, having suffered sea-damage, put into Key West, and there underwent necessary repairs. The master, not being able to raise money on personal security for the repairs, gave a bottomry bond on ship, freight, and cargo. He did not, before hypothecating, communicate with the owner or the consignees of the cargo, by reason of the great delay and uncertainty in the transmission of letters. *Held*, that the bond was binding on ship, freight, and cargo.—*The Lizzie*, Law Rep. 2 Adm. & Ecc. 254.

2. When the master fails to obtain funds from the owners of the ship or cargo, he is authorized to raise money to pay for necessary repairs and supplies, after such repairs and supplies have been furnished, by giving a bottomry bond on ship, freight, and cargo to persons other than those who have furnished

the repairs and supplies, especially when by the *lex loci* these latter persons have a maritime lien on the ship to enforce their demands. *The Karnak*, Law Rep. 2 Adm. & Ecc. 289.

3. A master, being also part-owner of a vessel, had, by a bottomry bond, bound himself, ship, freight, and cargo. He brought a suit against the vessel for his wages and disbursements. *Held*, that the owners of part of the cargo could not oppose his being paid his wages and disbursements in priority to the bondholder.—*The Daring*, Law Rep. 2 Adm. & Ecc. 260.

## BROKER.

A., an officer of a company formed to carry on the business of stockbroking, bought some stock for a customer in the course of business, and signed the bought and sold notes, the principals not seeing one another, and no one else acting as broker in the transaction. A. had no license to act as broker. *Held*, that he was liable to a penalty for acting as broker. *Scott v. Cousins*, Law Rep. 4 C. P. 177.

See CUSTOM; SALE, 2-6.

BURDEN OF PROOF—See INSURANCE, 8.

CARRIER—See RAILWAY, 2.

## CHARITY.

1. Bequest in trust for "such charities and other public purposes as lawfully might be in the parish of T.," is a good charitable gift.—*Dolan v. Macdermot*, Law Rep. 8 Ch. 676.

2. Legacies to the Royal, to the Royal Geographical, and to the Royal Humane Societies, are charitable.—*Beaumont v. Oliveira*, Law Rep. 6 Eq. 584.

3. Testator bequeathed as follows: "I give to the trustees of Mount Zion Chapel, where I attend, £8,500, and appoint as trustees to the same A. and G.; and I direct that their receipt shall be a discharge to my executors; and the money to be appropriated according to statement appended." There was no statement appended. *Held*, that the gift was not intended for A. and G. beneficially; that the court could not presume a charitable object in the bequest; and, if not charitable, that the object was so indefinite that the gift must fail. *Aston v. Wood*, Law Rep. 6 Eq. 419.

4. Under wills dated between 1716 and 1808, various funds were given for the ministers, and otherwise for the benefit of Protestant Dissenters called "Presbyterians," at D. There had existed a Presbyterian chapel at D. since 1662, some Baptists had associated with them, and the Baptist element had so increased, that, in 1863, only a few of the members were Presbyterian, and since 1803 the ministers of the

## DIGEST OF ENGLISH LAW REPORTS.

chapel had been Baptist. An information was filed in 1863, raising the question who were entitled to these funds, which were proved to have been enjoyed by the minister and congregation for the last seventy years; and in 1865 a congregation was formed by persons claiming to be strict Presbyterians, who now claimed the funds as such. *Held*, (1) that the use of the term "Presbyterian" did not amount to a requisition that the particular religious doctrines or mode of church government now claimed to be Presbyterian should be taught or observed; and that, under the 7 & 8 Vict. c. 45, the usage for the last twenty-five years must be held conclusive, and that the congregation who had enjoyed the funds must be declared entitled; (2) that, on the evidence, there had been no strictly Presbyterian congregation at D. for the last century, and that the funds would, if necessary,<sup>9</sup> be applied *cyprès* in favor of the congregation in possession.—*Attorney-General v. Buncle*, Law Rep. 6 Eq. 563.

See MORTMAIN; WILL, 5.

CHARTER PARTY—See FREIGHT, 8; SHIP, 1-3.

CHEQUE—See GIFT.

CODICIL—See REVOCATION OF WILL.

COLLISION.

1. The owners of a foreign vessel claimed damages for a collision between their vessel and an English ship, in Belgian waters. The defendants, owners of the English ship, pleaded that the vessel was in charge of a pilot, whom they were compelled by the Belgian laws to take. The plaintiffs pleaded in reply that, by the same laws, the owner of the vessel in fault, though compelled to take a pilot, continued liable for damages. *Held*, that the reply should be stricken out; that an English court would not enforce a foreign municipal law, and give a remedy in damages in respect to an act which by the English law imposed no liability on the person from whom the damages were claimed.—*The Halley*, Law Rep. 2 P. C. 198.

2. The Merchant Shipping Act exempts a vessel from compulsory pilotage in her own port. The defendants' vessel took a pilot outside of her own port at a point where pilotage was compulsory, and the pilot brought her into the port. Through the pilot's negligence, she came into collision with the plaintiff's vessel. It was in dispute whether the collision was inside or outside of the port. *Held*, (*per* MARTIN, BRANWELL and CHANNELL, BB.; KELLY, C.B., *dissentiente*), that even assuming that the collision was within the port, yet that

the pilot having been compulsorily put in charge of the ship, and his duty as pilot not having ended, he was not the servant of the defendants, and they were not responsible for his negligence.—*General Steam Navigation Co. v. British & Colonial Steam Navigation Co.*, Law Rep. 3 Ex. 330.

3. The owners of a vessel having, by compulsion of law, a pilot on board, are yet liable for the damage caused by a collision, if the master's neglect of duty was conducive thereto.—*The Minna*, Law Rep. 2 Adm. & Ecc. 97.

4. The bailees of a barge which has been injured by a collision, can sue *in rem* in the Admiralty; but the court will direct that the money awarded as compensation for damages shall not be paid till it has been satisfactorily established that the payment will release the owners of the vessel sued from all claims by the owners of the barge in respect of the collision.—*Id.*

5. In a collision cause, the defendant cannot rely on a simple negative, but must state the circumstances relating to the collision.—*The Why Not*, Law Rep. 2 Adm. & Ecc. 265.

See ADMIRALTY, 2; INSURANCE, 1.

COMMON, TENANCY IN—See TENANCY IN COMMON.

COMMON CARRIER—See RAILWAY, 2.

COMPANY.

1. T., being a registered holder of five shares in a joint stock company, left the share certificates with her broker. A transfer of the shares to S. purporting to be executed by T., together with the certificates, was left with the secretary for registration. The secretary, in the usual course, wrote to T. that the transfer had been so left, and receiving no answer after ten days, registered the transfer, and removed the name of T., and placed the name of S. on the register, giving S. a certificate that he was the registered holder of the five specific shares. A. bargained for five shares, through brokers in the usual way, and paid the value of the five shares, and the specific five shares were transferred to him by S., and A.'s name was put on the register and the five shares delivered to him. Afterwards the transfer to S. was discovered to be a forgery, and T.'s name was ordered by rule of court to be restored to the register. On a case stated; *Held*, that the giving of the certificate to S. amounted to a statement by the company intended to be acted on by purchasers of shares in the market that S. was entitled to the shares; and that A. having acted on that statement, the company were estopped to deny its truth; and that A. was, therefore, entitled to recover from

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the company the value of the shares, at the time the company refused to recognize him as a shareholder, with interest from that time.—*In re Bahia & San Francisco Railway Co.*, Law Rep. 8 Q. B. 584.

2. The articles of association of a company provided that the business should be fixed, determined, and regulated by such rules, regulations, and by-laws as the directors might from time to time make, which should be entered in a book kept for that purpose, and signed by three directors. A by-law so made prohibited certain acts. A resolution authorizing some of such acts was afterwards passed by the directors and entered in their minute book, but not entered in the book of by-laws nor signed by the directors. *Per GIFFARD, L. J.*, that a third person would not be affected by the by-law unless it was proved that he knew it; and, *semble*, that had he known it, the resolution of the directors would have done away with its effect.—*Royal Bank of India's Case*, Law Rep. 4 Ch. 252.

3. A shareholder in a company, in behalf of himself and the other shareholders, may maintain a bill to set aside an agreement by the company as *ultra vires*, without joining as defendants any of the shareholders who have assented to the agreement.—*Clinch v. Financial Corporation*, Law Rep. 4 Ch. 117.

See **BILLS AND NOTES**, 2, 3; **ESTOPPEL**; **MORTGAGE**, 1; **RAILWAY**; **SALE**, 2-6; **STATUTE**; **ULTRA VIRES**.

**CONCEALMENT**—See **HUSBAND AND WIFE**, 2.  
**CONDITION**.

A lease contained a proviso for re-entry in case the lessee or any occupier of the premises should be convicted of an offence against the game laws. The occupier of the premises having been convicted of killing game without a game certificate, the assignee of the reversion brought ejectment. *Held*, that he could not maintain the action (*per MARTIN, CHANNELL and CLEASBY, BB.*), because the condition did not run with the land, and therefore the assignee could not avail himself of its breach; (*per KELLY, C.B.*), because killing game without a certificate was an offence, not against the game, but against the revenue laws.—*Stevens v. Copp*, Law Rep. 4 Ex. 20.

See **LEGACY**, 1; **VENDOR AND PURCHASER OF REAL ESTATE**, 2.

**CONFIDENTIAL RELATION**—See **UNDUE INFLUENCE**, **CONFLICT OF LAWS**.

Where an Englishman contracts a debt in a foreign country the provisions of the *lex loci contractus* do not avail to entitle the creditor

to payment of his debt out of equitable assets administered in this country, in priority to other creditors.—*Pardo v. Bingham*, Law Rep. 6 Eq. 485.

See **COLLUSION**, 1.

**CONSPIRACY**—See **INDICTMENT**, 2.

**CONTEMPT**.

1. While a suit was pending to restrain the infringement of a patent, in which one of the issues raised was as to the novelty of the plaintiff's invention, a discussion having arisen in a newspaper as to the merits of the invention, the defendant's solicitor wrote, under an assumed name, a letter, which was published in the newspaper, taking part in the discussion, and alleging facts tending to disprove the novelty of the invention. The plaintiff, thereupon, sent to the editor of the newspaper a letter, which the editor refused to insert on account of its personal imputations, in which he referred to the suit, and suggested that the writer of the letter was an interested party. The editor, not knowing that the writer was the solicitor in the suit, but knowing that he was a solicitor, subsequently published a further letter from him disputing the novelty of the invention. *Held*, that the solicitor had been guilty of contempt in publishing letters tending to influence the result of the suit. A motion to commit the publisher of the newspaper for contempt was refused, but without costs.—*Daw v. Eley*, Law Rep. 7 Eq. 49.

2. For a newspaper to publish affidavits filed in behalf of the plaintiff in a bill of equity (but not yet before the court), with comments tending to prejudice the plaintiff's case, is a contempt.—*Tichborne v. Mostyn*, Law Rep. 7 Eq. 55, note.

3. When there is no collusion, a husband will not be committed for his wife's breach of injunction.—*Hope v. Carnegie*, Law Rep. 7 Eq. 254.

See **COSTS**.

**CONTRACT**.

A. applied for workmen to the Free Labor Society, and filled up and signed a form containing the particulars and terms of employment, and his address at S. This form was read over to B. by the secretary of the society, and B. then signed an agreement headed "Free Labor Society," by which he stated that he had accepted employment at S., and agreed that one-half day's wages, "being his fee to the society for obtaining him the employment," should be deducted from his wages, and that he would not quit "the service of his employer" without just cause. *Held*, that the documents

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sufficiently referred to one another to constitute a contract in writing signed by other parties within the meaning of 80 & 81 Vict. c. 141, s. 9, giving summary jurisdiction to justices in cases between master and servant. *Crane v. Powell*, Law Rep. 4 C. P. 123.

See BILL OF LADING; COVENANT; CUSTOM; DAMAGES, 2, 3; INFANT; MASTER AND SERVANT; MONEY HAD AND RECEIVED; SALE; SPECIFIC PERFORMANCE; STATUTE.

## CONVERSION.

A testator devised real estate to trustees on trust to pay the profits to his wife till her death or marriage, and on her death or marriage on trust for his children who should be then living, and their respective heirs as tenants in common, with a power to the trustees, in their discretion, to sell the real estate, and in event of such sale to divide the proceeds among his children, who should then be living, in equal shares. During the widow's lifetime, one of the children assigned all his personal estate in possession, remainder or expectancy, to A. On the widow's death, the trustees, in exercise of the power, sold the real estate. *Held*, that the child's share of the proceeds did not pass to A.—*In re Ibbitson's Estate*, Law Rep. 7 Eq. 226.

## COPYRIGHT.

1. A., a citizen of the United States, published a work in the monthly parts, between January and December, 1867, of a magazine published in the United States. In October, 1867, A. went to Canada, and while there, when the work wanted six chapters for completion in the magazine, an edition of the whole was published in London, under an agreement between A. and the plaintiff, an English publisher. A reprint taken from the pages of the magazine having been subsequently published by the defendant *Held*, that the copyright was divisible, and could be claimed for a portion of the book only, and the publication by the defendant of the last six chapters was enjoined.—*Low v. Ward*, Law Rep. 6 Eq. 415.

2. In a trades' directory, the names of those who paid for the privilege were printed in capitals, with additional descriptions of their business called "extra lines." *Held*, that such payment did not make the information common property, so as to entitle the compiler of another directory to reprint it from slips cut from the first, even where the persons whose names were so printed had been applied to, to verify the information, and had paid for

the insertion of their names in the second directory with the distinctive features of capitals and extra lines.—*Morris v. Ashbee*, Law Rep. 7 Eq. 34.

See PARTNERSHIP, 2.

CORPORATION—See COMPANY.

## COSTS.

A motion to commit A. for breach of an injunction was refused, but without costs, and A. appealed. *Held*, that an appeal as to costs in such a case would not be entertained.—*Hope v. Carnegie*, Law Rep. 4 Ch. 264.

See ATTORNEY; LANDLORD AND TENANT, 8; LUNATIC, 2; MESNE PROFITS, 2; VENDOR AND PURCHASER OF REAL ESTATE, 3.

## COVENANT.

1. The purchaser of lands below sea-level is bound to inquire how all walls necessary for the protection of his property against the sea are maintained.

Lands below sea-level, previously held in undivided shares, were, in 1794, partitioned by a deed containing a covenant that the expense of maintaining the walls belonging to the lands thereby divided should be borne by the owners thereof, and should be payable out of the lands by an acre-scut. *Held*, that a purchaser of part of the lands was bound by the covenant, though he had no actual notice thereof, and that there was jurisdiction in equity to deal with the case.—*Morland v. Cook*, Law Rep. 6 Eq. 252.

2. A. sold part of an estate to B., who entered into restrictive covenants for himself, his heirs and assigns, with A., his heirs, executors, and administrators, as to buildings on the purchased property; but A. did not enter into any covenants as to the land retained. After this A. sold to other persons various lots of the part retained, but nothing appeared as to the contents of their conveyances, nor was there any evidence that they were informed of B.'s covenants. After this A. bought back from B. what he had sold to him. *Held*, that the benefit of B.'s covenants did not in equity pass to the subsequent purchasers of other parts of the estate from A., and that A. could make a title to the repurchased land discharged from the covenants.—*Keates v. Lyon*, Law Rep. 4 Ch. 218.

3. A. demised lands to B. for a long term of years, and B. covenanted that neither he nor his assigns would permit any building to be erected on a certain lot. Afterwards a rail-



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road company took the lot, and B. was compelled to assign to them by virtue of a statute passed subsequently to the demise. The company built a station on the lot. *Held*, that B. was discharged from his covenant, and that it made no difference whether the company was compellable or only empowered to build the station on the lot.—*Baily v. De Crespigny*, Law Rep. 4 Q. B. 180.

See CONDITION; HUSBAND AND WIFE, 8;  
LANDLORD AND TENANT, 5, 6.

## CRIMINAL LAW.

27 & 28 Vict. c. 47, s. 2, enacts that when any person shall be convicted of any crime punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded shall be for seven years. A. was convicted of a crime punishable with penal servitude. The indictment did not charge a previous conviction of felony; but, after a verdict of guilty, it was proved on oath that A. had been previously convicted of felony, but no record of such conviction was produced. A. was sentenced to penal servitude for five years. *Held*, that the sentence was correct.—*The Queen v. Summers*, Law Rep. 1 C. C. 182.

See ADMIRALTY, 1; ARREST; EMBEZZLEMENT;  
INDICTMENT; INJUNCTION, 4; JUDGMENT;  
JURY; LARCENY; RAPE; VOTER, 2.

## CROSS REMAINDERS.

A. devised a moiety of certain land to and between B., C., and D., in equal shares, and the heirs of their bodies respectively, and in default of such issue of "any of them," to M., her heirs and assigns. *Held*, that "any" must be construed "all," and that cross-remainders were created by implication between B., C., and D.—*Powell v. Howells*, Law Rep. 8 Q. B. 654.

## CUSTOM.

The usage of the Stock Exchange is, that, in transactions between members, there is an implied understanding that, on the purchase of shares, the buying jobber may, by a given day, called "name day," substitute another person as buyer, and so relieve himself from liability, provided such person is one whom the original seller cannot reasonably except, and that such person accept a transfer of the shares, and pay to the original seller the price. *Held*, a reasonable custom.—*Grissell v. Bristowe*, Law Rep. 4 C. P. 36.

See SALE, 2-6.

CYPRUS—See CHARITY, 4.

## DAMAGES.

1. One who for his own purposes brings, collects, and keeps on his land any thing likely to do mischief if it escapes, *e.g.* water, must keep it in at his peril, and is answerable for all damage which is the natural result of its escape, without proof of negligence on his part.—*Rylands v. Fletcher*, Law Rep. 3 H. L. 380.

2. A company contracted with A. to repair a ship within twenty weeks from the 1st of April, 1865. The repairs were not finished, and the ship delivered to A. until May, 1866. The company being ordered wound up, A. claimed to prove (1) for damages for non-delivery at the stipulated time; (2) for depreciation in value by reason of the non-delivery; (3) for damages by reason of the repairs not having been properly completed. *Held*, that A. was entitled to prove (1) for the amount of the net profits he might have made by chartering the vessel, if she had been delivered properly repaired twenty weeks after the 1st of April, 1865, instead of in May, 1866; and (2) for the amount which it would have cost A. to have completed the repairs at the time she was delivered.—*In re Trent & Humber Co.*, Law Rep. 6 Eq. 396.

8. If a ship is sent to a ship-builder for repair, and is detained by him beyond the time within which he stipulated that the repairs should be finished, the measure of damages is, *prima facie*, the sum which would have been earned in the ordinary course of employment of the ship during the period she was retained beyond the agreed time.—*In re Trent & Humber Co.*, Law Rep. 4 Ch. 112.

See ACTION; LANDLORD AND TENANT, 6, 8;  
MEANE PROFITS, 2; RAILWAY, 1; SLANDER.

DEATH—See DIVORCE, 1.

## DEMAND.

To secure a floating balance, A. conveyed to B. machinery by bill of sale, containing a proviso for redemption if A. should instantly, on demand and without delay on any pretence whatever, pay the sum due; it provided that the demand might be made either personally or by giving or leaving verbal or written notice to or for him at his place of business, or any other place in which any of the property conveyed might be, or at his residence "so nevertheless that a demand be in fact made." In A.'s absence from his place of business, B. made a demand there on A.'s son, and on the son's stating his inability to pay, had immediately seized the property. *Held*, that the

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notice contemplated was such as might be reasonably supposed to reach A., and to give him an opportunity of complying with it within a reasonable time, and that, therefore, the seizure was not justified.—*Massey v. Sladen*, Law Rep. 4 Ex. 13.

See INTEREST, 2.

## DEVISE.

1. Testator by will, made in 1865, gave to trustees certain land held by him on lease, and part of which he described as leasehold, on certain trusts. He also made a residuary devise and bequest of realty and personality. After the date of the will, the fee of the said land was conveyed to him. *Held*, that this fee passed to the trustees.—*Cox v. Bennett*, Law Rep. 6 Eq. 422.

2. A testator directed his debts to be paid. He then gave pecuniary legacies, and gave all the residue and remainder of his real and personal estate to T. for her own use. *Held*, that though the testator's own real estate was charged with debts and legacies, the legal estate in property, of which he was mortgagee, passed under the residuary devise.—*In re Stevens's Will*, Law Rep. 6 Eq. 597.

3. By will made before the passing of the Wills Act, A. devised certain property to his grandson S., "and if he shall die without issue, that property shall return to the E. family; but if he lives to have children, he shall have power to make a will of it to his children." *Held*, that S. took an estate for life only, and not an estate tail by implication. *Eastwood v. Avison*, Law Rep. 4 Ex. 141.

4. A testator devised three freehold houses to trustees, in trust, as to the first two, to receive the rents and pay the same to his wife during her widowhood, and on her death or marriage, as to the first, to convey the same to his "daughter A., her heirs and assigns forever;" as to the second, in similar terms to his daughter B.; and as to the third, "on trust to apply the rents for the advancement and benefit of my grand-daughter C. till she attains twenty-one; but in case C. should die under that age, then I devise the said house to my daughters A. and B., their heirs and assigns as tenants in common." He then gave all the residue of his estate real and personal to other of his children. *Held*, that the trustees had the legal fee of the three houses; and that C. took the equitable fee in the third house, subject to defeasance, if she died under twenty-one.—*Cropton v. Davies*, Law Rep. 4 C. P. 159.

See CONVERSION; CROSS REMAINDERS; ILLEGITIMATE CHILDREN; LEGACY; PREPETUITY; POWER, 3; VESTED INTEREST; WILL, 5-7.

DISCOVERY—See PRODUCTION OF DOCUMENTS.

## DIVORCE.

1. A decree absolute for a divorce was made, notwithstanding a suggestion supported by affidavits that the respondent and co-respondent were dead; the evidence not being sufficient for the court to determine whether they were dead or not.—*Dering v. Dering*, Law Rep. 1 P. & D. 531.

2. The "wilful neglect and misconduct" conducing to adultery, intended by 20 & 21 Vict. c. 85, s. 81, is not mere carelessness. To find a husband guilty of such misconduct, it must be shown that there was such an intimacy between the wife and the co-respondent as to be distinctly dangerous, and that he actually knew so much of the intimacy as to perceive the danger, and that he either purposely or recklessly disregarded it, and forbore to interfere.—*Id.*

3. The fact that a husband makes his wife an allowance in lieu of alimony while a divorce suit is pending, is not, of itself, evidence of collusion. But evidence that a husband had several interviews with his wife both before and after he presented a petition for dissolution, and gave her money, and urged her not to oppose the petition, and promised that he would do no harm to the co-respondent, and would be a friend to her when the petition was obtained, was *held* to prove collusion, the respondent and co-respondent not having been present at the hearing, and material facts showing that the petitioner had, by his conduct, conducing to the respondent's adultery having been withheld from the court.—*Barnes v. Barnes*, Law Rep. 1 P. & D. 505.

4. In a suit by a husband for dissolution of marriage on the ground of the wife's adultery, adultery was charged against the petitioner, and proved, and the petition was dismissed. Afterwards the husband brought another petition, charging his wife with adultery with another man. *Held*, that in this suit the decree in the former suit was evidence of the petitioner's adultery.—*Conradi v. Conradi*, Law Rep. 1 P. & D. 514.

See ALIMONY; INJUNCTION, 5; NULLITY OF MARRIAGE.

## REVIEWS.

## REVIEWS.

ON PARLIAMENTARY GOVERNMENT IN ENGLAND; ITS ORIGIN, DEVELOPMENT AND PRACTICAL OPERATION. By Alpheus Todd, Librarian to the House of Commons of Canada, in two volumes. Vol II., London: Longman, Green & Co., 1869.

This is emphatically one of the books of the day, whether we look at it with reference to the subject treated of, the clearness, comprehensiveness of its arrangement, or the great learning evinced in its preparation.

We may well feel proud that in Canada has been found a writer who has supplied to England a work which, if we can believe contemporary critics, and if our own humble judgment does not lead us astray, is destined to be, as has been said of it by an English critic, "an authority on the important subject of which it treats, and which ought to have a place along with Sir Erskine May's *Parliamentary Practice and Constitutional History*, on the shelves of every member of the Legislature." The author is not "without honor in his own country," for who that pretends to know anything of the inside of the Houses of Parliament in Canada but knows, as many have experienced, the ready courtesy and research that has solved and explained so many troublesome doubts on points of *Parliamentary Practice or Constitutional Law*. But this work will give Mr. Todd a reputation as a writer such as few possess, for wherever the Anglo-Saxon law extends, or wherever exist the principles of *Parliamentary Government* such as we have it and such as it is in England, this book will be the great authority. Mr. Todd's familiarity with the subject, was known years before he gave the public the benefit of his learning—but it is one thing to be thoroughly conversant with a subject, and another to sit down steadily and methodically to commit that knowledge to paper, in such a way as to bring the whole of an intricate and little understood subject clearly and intelligently before the reader, and that with apt authority and example for each proposition. In this Mr. Todd has succeeded in a way that has called forth the admiration of exacting reviewers in England, and of those who are most competent to form an opinion as to its intrinsic merits. In fact to repeat the first sentence of the review of this elaborate work in *The Law*

*Magazine* (August, 1869), "There could be no better exposition of the theory and practice of *Parliamentary Government* in England than that contained in the treatise of Mr. Todd, now completed by the volume before us." Or as another reviewer says, "Every Englishman who can read should read this book."

The second volume commences with an enquiry into and description of the councils of the Crown under prerogative governments, and it is curious to remark, though the observation is not novel, the wonderful similarity, taking times and circumstances into consideration between the relative powers of, and interdependence between the sovereign and his Witan or Council in the Saxon period, and the Kings, Lords and Commons of the present day.

The author gives an interesting account of the increasing and encroaching influence of the Sovereigns from the time of the Norman Kings down to the reign of the second Stuart, when the overwhelming power of the kingly office received its death blow; upon which followed the development of constitutional government and the increasing influence of the Council, known afterwards as the Cabinet Council, which since the time of the Saxons and up to the time of Wm. III., had been more or less "a pliant instrument in the hands of the reigning monarch, but was made responsible to Parliament by the Revolution of 1688."

In the second chapter the present position, history, powers and responsibilities of the Privy Council under parliamentary government are discussed, and here the attention of the reader is drawn to the main distinction between the Privy Council and the Cabinet Council:—

"Ever since the separate existence of the Cabinet Council as a governmental body, meetings of the Privy Council have ceased to be holden, for purposes of deliberation. At the commencement of the reign of George III., we find this distinction between the two councils clearly recognised—that the one is assembled for deliberative, and the other merely for formal and ceremonial purposes. It is, in fact, an established principle, that 'it would be contrary to constitutional practice that the sovereign should preside at any council where deliberation or discussion takes place.'

At meetings of the Privy Council, the sovereign occupies the chair. The President of the Council sits at the Queen's left hand; it being noticeable that this functionary 'does not possess the authority usually exercised by

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the president of a court of justice." (Vol. I, p. 58.)

The administrative functions of the Privy Council, as a Department of State, are also fully explained in another part of the work.

The author in the 8rd chapter, returning from the general survey of the King's Councils under prerogative government, proceeds to discuss the rise, progress, and present condition of the Cabinet Council, the supreme governing body in the political system of Great Britain. The ground occupied in this chapter is entirely new, and the reader will look in vain in any other work for the information which is to be found in this chapter,—and it has been no idle head or hand that has so exhausted the subject and arranged his material in such a lucid shape.

In speaking of the office of Prime Minister he says:—

"The development of the office of Prime Minister in the hands of men who combine the highest qualities of statesmanship with great administrative and parliamentary experience—such as Sir Robert Walpole, the two Pitts, and Sir Robert Peel—has contributed materially to the growth and perfection of parliamentary government. Before the Revolution, the king himself was the main-spring of the State, and the one who shaped and directed the national policy. If he invoked the assistance of wiser men in this undertaking, it was that they might help him to mature his own plans, not that they might rule under the shadow of his name. With the overthrow of prerogative government all this was changed. When the king was obliged to frame his policy so as to conciliate the approbation of Parliament, it became necessary that his chief advisers should be statesmen in whom Parliament could confide. And no ministers will accept responsibility unless they are free to offer such advice as they think best, and to retire from office, if they are required to do anything which they cannot endorse. In every ministry, moreover, the opinions of the strongest man must ultimately prevail. Thus, by an easy gradation, the personal authority of the sovereign under prerogative government receded into the background, and was replaced by the supremacy of the Prime Minister under parliamentary government. In the transition period which immediately succeeded the Revolution, William III., by virtue of his capacity for rule, as well as of his kingly office, was the actual head and chief controller of his own ministries. But the monarchs who succeeded him upon the throne of England were vastly his inferiors in the art of government. George I. was unable to converse in the English language, and, therefore, disabled from a systematic interference in administrative details.

His son, though less incapable, was conscious of his imperfect knowledge of domestic affairs, and, like his father, directed his attention almost exclusively to foreign politics. This tended to reduce the personal authority of the sovereign to a very low ebb, and in the same proportion to increase the influence and authority of the cabinet. But with the accession of George III. a reaction, begun in the preceding reign, set in for a time. Anxious to prove himself a faithful and efficient ruler, and being well qualified for the discharge of the functions of royalty, George III. lost no opportunity of aggrandising his office. Whereupon the power of the crown, which had been weakened and obscured by the ignorance and indifference of his immediate predecessors, became once more predominant. Not satisfied, however, with the exercise of his undoubted authority, the king repeatedly overstepped the lawful bounds of prerogative and the acknowledged limits of his exalted station. It was reserved for William Pitt, whose pre-eminent abilities as First Minister of the Crown empowered him to control successfully the proceedings of the legislature, while retaining the confidence of his sovereign, to vindicate for the Prime Minister the right to initiate a policy for the conduct of all affairs of State, and to urge the adoption thereof equally upon the Crown and upon Parliament, with the weight and influence appertaining to his responsible office, thereby securing the full and entire acceptance by each of the primary maxims of parliamentary government." (Vol. II, p. 136.)

The above, which prefaces the remarks of the author as to the development and present position of the Premier, gives incidentally a short sketch of the growth of Responsible Government, which is also spoken of in the first volume, with reference to the responsibility of Ministers for acts of the Crown, and in other places throughout the work, and in fact "Responsible" or "Parliamentary" Government are now in a measure synonymous terms, and the history of the former is necessarily included in an enquiry into the latter.

Chapter IV. is devoted to the Ministers of the Crown, concluding with the responsibility of such ministers to Parliament.

Chapter V. speaks of the Departments of State, their constitution and functions. With the next chapter Mr. Todd brings his labours to an end. This chapter is especially interesting to professional readers, and treats of the relation of the judges of the land to the Crown and to Parliament. And here again the author is the first in the field to supply information as to the proper course of procedure in Parliament against delinquent judges.

## REVIEWS.

Some time ago, when speaking of the retirement of Chief Justice Lefroy, and the attacks made upon that venerable Judge, not only outside, but in both Houses of Parliament, we had occasion (2 U. C. L. J., N. S., p. 261) to touch upon the constitutional mode of bringing up the misconduct or incompetency of judges. We had at that time the pleasure of hearing Mr. Todd's (then unpublished) views on this subject. The whole matter is now given to the public in a more full and complete manner, not only with reference to the Judges 'Superior and Inferior' of Great Britain and Ireland, but also to Colonial Judges. Speaking with reference to the latter he says:

"So long as Judges of the Supreme Courts of law in the British Colonies were appointed under the authority of Imperial statute, it was customary for them to receive their appointments during pleasure. Thus, by the Act 4 Geo. IV. c. 96, which was re-enacted by the 9 Geo. IV. c. 83, the Judges of the Supreme Courts in New South Wales and Van Dieman's Land are removable at the will of the crown. And by the Act 6 & 7 Will. IV. c. 17, sec. 5, the Judges of the Supreme Courts of Judicature in the West Indies are appointed to hold office during the pleasure of the crown.

Nevertheless, the great constitutional principle, embodied in the Act of Settlement, that judicial office should be holden upon a permanent tenure, has been practically extended to all Colonial Judges; so far at least as to entitle them to claim protection against arbitrary or unjustifiable deprivation of office, and to forbid their removal for any cause of complaint except after a fair and impartial investigation on the part of the crown.

In 1782 an Imperial statute was passed which contains the following provisions:—That from henceforth no office to be exercised in any British Colony 'shall be granted or grantable by patent for any longer term than during such time as the grantee thereof, or person appointed thereto, shall discharge the duty thereof in person, and behave well therein.' That if any person holding such office shall be wilfully absent from the colony wherein the same ought to be exercised, without a reasonable cause to be allowed by the Governor and Council of the colony, 'or shall neglect the duty of such office, or otherwise misbehave therein, it shall and may be lawful to and for such Governor and Council to remove such person' from the said office: but any person who shall think himself aggrieved by such a decision may appeal to his majesty in council.

This Act still continues in force, and although it does not professedly refer to Colonial Judges, it has been repeatedly decided by the Judicial Committee of the Privy Council to extend to such functionaries. Adverting

to this statute, in 1858, in the case of *Robertson v. The Governor-General of New South Wales*, the Judicial Committee determined that it 'applies only to offices held by patent, and to offices held for life or for a certain term,' and that an office held merely *during bene placito* could not be considered as coming within the terms of the Act.

From these decisions two conclusions may be drawn; firstly, that no Colonial Judges can be regarded as holding their offices 'merely' at the pleasure of the crown; and secondly, that, be the nature of their tenure what it may, the statute of the 22 Geo. III. c. 75 confers upon the crown a power of motion similar to that which corporations possess over their officers, or to the proceedings in England before the Court of Queen's Bench, or the Lord Chancellor, for the removal of judges in the inferior courts for misconduct in office. Under this statute, all Colonial Judges are removable at the discretion of the crown, to be exercised by the Governor and Council of the particular colony, for any cause whatsoever that may be deemed sufficient to disqualify for the proper discharge of judicial functions, subject, however, to an appeal to the Queen in Council. But before any steps are taken to remove a judge from his office by virtue of this Act, he must be allowed an opportunity of being heard in his own defence." (Vol. II, p. 746.)

In connection with this subject we in Ontario must read Con. Stat. U. C. cap. 10, sec. 11, which regulates the tenure of office of the Judges of our Superior Courts, and the recent Act of the Ontario Parliament of 32 Vic. cap. 22, sec. 2, under which County Court Judges hold office during pleasure, subject to removal by the Lieutenant Governor for inability, incapacity, or misbehaviour, established to the satisfaction of the Lieutenant-Governor in Council.

Numerous cases are cited to establish and explain the principles laid down by the author with reference to the cases in which Parliament should interfere and the mode of its procedure for the removal of judges. No cases, however, from this Province as yet "point the moral." Long may this continue, even though the two volumes before go through editions enough to satisfy the longing of even the most ambitious or deserving of authors.

This brief recital of the main points treated of by Mr. Todd gives no idea of the interesting and instructive matter of the work; as a mere history it contains information to be met with no where else, and given in the pleasantest and most readable manner. But it is not the historical details so interesting to the

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educated reader, that give the great value to the treatise; it will, we apprehend, be even more appreciated by another class of readers—those with a special knowledge of various abstruse political questions will find in it light and assistance. It is, however, only in general terms that we can speak of it in the latter sense, and we only admire at a distance those evidences of deep learning in the science of politics which is possessed by comparatively few men in England, and fewer still in Canada. When judged by those possessing this technical knowledge we think we may venture to predict that the result will be as satisfactory as it has proved to be when examined by the more general reader.

In Canada the value of such a work at this particular juncture cannot be too highly estimated. In England it is possible for leading politicians—with more wealth and consequent leisure, with a greater diffusion of political knowledge, a more liberal education than is obtainable here, and aided by the traditions of Parliamentary Government which seem to pervade the atmosphere of the British Houses of Parliament—without any *lex scripta*, to keep with but little deviation in the beaten path; here, however, it is necessarily and obviously different, and the want of even an elementary sketch has been keenly felt, and this brings to our mind another great feature in Mr. Todd's book, and that is, that it seems as admirably adapted for one class of readers as the other—equally useful as an elementary work for the student and of reference to the more advanced politician.

One more remark and we must reluctantly leave an author that has given us the most unqualified pleasure; the first volume bore evidence of Mr. Todd's strong views as to the propriety of withstanding the democratic tendency of the age, so much so that the only adverse criticism was, that the first volume had a "conservative" bias, however, that may be, the most ardent liberal can find nothing to complain of in the second volume, in fact, for all that appears therein, the learning of the author might reasonably be said to be in favour of the "whigs." But may not all this be explained to one who has read both volumes, by comparing the different subjects treated of in each, and the evident anxiety to see maintained that even balance between the sovereign and his people, so necessary for the integrity of a

limited monarchy, such as now exists in the British Isles.

Such a work as this that we have now so inadequately spoken of, is just one that should be made part of the course of education for any man who aspires to any knowledge of how he should govern and how he is governed, it should therefore be made part of the course in colleges and higher class of schools; it would not be even out of place in some one of the examinations intended to test the fitness of students for call to the bar. The fact that it is written by a Canadian author need not alarm those in authority; the reputation of the author as one of the most valuable contributors to the literature of this century is now established, and as such he has already been welcomed in England and Canada by those best able to judge of his merits.

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CASES AND OPINIONS ON CONSTITUTIONAL LAW AND VARIOUS POINTS OF ENGLISH JURISPRUDENCE, COLLECTED AND DIGESTED FROM OFFICIAL DOCUMENTS AND OTHER SOURCES, WITH NOTES, by William Forsyth, Esq., M.A., Q.C. London: Stevens and Haynes, Law Publishers, 11, Bell Yard, Temple Bar.

We have to thank the publishers for an advance copy of this work, which we have examined with curiosity and interest. The opinions of law officers of the Crown, though not as binding as legal decisions, are of great weight. In England the law officers are generally men of high standing in their profession, and men whose names give weight to any opinions pronounced by them on questions of law. And when men eminent in their profession, in the discharge of their public duties, give well-considered opinions to the Crown on questions of jurisprudence, their opinions are deserving of unusual respect.

In 1814 George Chalmers who, after an eventful life died in London on 31st May, 1825, published a volume of such opinions which, though not well arranged, has been much esteemed both in England and the United States, and in the latter country was republished by C. Goodrich and Company, of Burlington, as late as 1858. It contains the opinions of such eminent men as Lord Somers, Chief Justice Holt, Lord Hardwicke, Lord Talbot and Lord Mansfield, when law officers

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of the Crown. No work of the kind has since been published, and Mr. Forsyth, who is well known as a legal writer, has done good service to his profession by the production of a similar volume, which in some degree bridges over the period of time between the first publication of Chalmers' Opinions and the present time. In this volume, which is elegantly printed and presents a highly creditable appearance, we find opinions of Lord Lyndhurst, Lord Abinger, Lord Truro, Lord Denman, Lord Cranworth, Lord Campbell, Lord St. Leonards, Lord Romilly, Lord Westbury, Lord Cairns, Lord Chief Justice Cockburn, and Lord Chief Baron Kelly.

The collection of these opinions appears to have been a labour of considerable difficulty. The opinions of the law officers of the Crown it is said are scattered over 2,000 or 3,000 volumes of manuscript, without any general index whatever. This is very discreditable to those who, during the time these opinions were given, presided over the departments of Government in which the opinions are recorded. One is at a loss to understand why such gross neglect should be allowed, not merely to exist, but to be of such long continuance. However, in contrast with this exposure of official negligence, it is pleasant to note the assistance given by some of the heads of departments to Mr. Forsyth in the preparation of his work. Fortunately for the value of the work, so far as the Colonies are concerned, Earl Granville, the Secretary of State for the Colonies, was particularly kind in the assistance which he gave; but this cannot be said of the Earl of Clarendon and the Foreign Office.

No opinions given since 1856 have been placed in the series. We regret that the learned author did not publish opinions given since that year. We cannot conceive of any valid reason against their publication, and expect in a new edition of the work to see this want supplied. We should like to be placed in possession of the official opinions of Sir Roundell Palmer, and other law officers of great distinction in our profession.

Several of the opinions published affect Canada. One dated 21st February, 1826, as to the appointment of a Roman Catholic Bishop in Canada, will be perused with much interest. Others of equal interest to us will be found in the volume.

We must not forget to mention the valu-

able notes of the authors. Some are the result of much thought, great search and display, considerable legal acumen. The notes as to extradition of criminals may be here mentioned. The author shows that the extradition of criminals is a matter of country not of right, except in the cases of special convention, and refers in a clear manner to several special conventions and Acts of Parliament passed to give effect to them.

The opinions which are varied and diversified, are well classified as follows:—The common law and statute law applicable to the Colonies; ecclesiastical law applicable to the Colonies; the powers and duties and civil and criminal liabilities of governors of Colonies; Vice-Admiralty jurisdiction and piracy; certain prerogatives of the Crown; martial law and courts-martial; extra territorial jurisdiction; the *lex loci* and *lex fori*; allegiance of aliens; extradition; appeals from the Colonies; the revocation of charters; the nationality of a ship, and other matters relating to ships; the power of the Crown to grant exclusive rights of trade; the writ of *habeas corpus*; certain points relating to criminal law, and miscellaneous subjects. Our chief regret is that the general index to the volume, though full, is not more full and exhaustive. In a future edition we trust this will be remedied. But upon the whole we are well pleased with the work, and frankly commend it to the patronage of all lawyers and others who take an interest in the relations of the parent state to their Colonies, and at present that interest is wide spread both at home and here. Mr. Forsyth at the present juncture has done good service, not only to his profession but to all men who take any interest in public affairs, and we therefore hope that those for who the book is especially intended will not be backward in giving to it that support which the industry and ability of its author, and the public spirit and enterprise of its publishers so well deserve.

THE LEGAL GAZETTE (WEEKLY), 607, Samson Street, Philadelphia.

This adds another to the many journals published in the United States, we may even say in Pennsylvania. It presents an excellent appearance, and would seem to be well and vigorously edited. It is intended to supply a local want, though many of the cases to be found in it are of general interest.

## COMMON LAW CHAMBERS.

## DIARY FOR OCTOBER.

8. SUN. *19th Sunday after Trinity.*
10. SUN. *20th Sunday after Trinity.*
15. Frid. Law of England introduced into Upper Canada 1792.
17. SUN. *21st Sunday after Trinity.*
18. Mon. *St. Luke Evangelist*
24. SUN. *22nd Sunday after Trinity.*
28. Thur. *St. Simon and St. Jude.*
30. Sat... Articles, &c., to be left with Secretary Law Soc.
31. SUN. *23rd Sunday after Trinity. All Hallow Eve.*

THE

## Canada Law Journal.

OCTOBER, 1869.

## COMMON LAW CHAMBERS.

Regularly as the Spring and Autumn Circuits come round, the troubles of those who are in any way connected with proceedings before the Judge in Chambers begin. Suitors blame their attorneys for delays in their suit, and consequent loss to them. Country attorneys blame their Toronto agents for supposed neglect of their business, or slipshod unsatisfactory settlements of pleadings or matters of practice. Agents and practitioners in Toronto are at their wits-end to keep track of the movements of the judges, so as to be able to make or answer motions. Hearing, perhaps, that the judge is to be at Chambers in Osgoode Hall, they rush there frantically to find no one, and then dodge into the Court House to find perhaps, that an order has been made against them in their absence. The judge holding the Toronto assizes thinks it hard that he should commence a fatiguing day's work on the Bench by hearing the Chamber business from nine until ten o'clock in the morning; and again, a judge returning from a distant circuit, for perhaps a few days, thinks he might have a little rest and leisure to attend to his own affairs after, perhaps, a long absence from home on public business.

But still the work must be done, and somebody must do it. It is of course as matters now stand, the duty of the judges to do it between them. That it is often done unsatisfactorily, when it devolves on the judge holding the Toronto Assizes, is a matter of necessity, as he has to scramble through it at a head-long speed, to be able to attend to his duties on the

Bench. If it is thought that there is another judge in town who may hold Chambers at Osgoode Hall, the natural desire is to take the business before him; and perhaps some twenty persons, lawyers from the country, Toronto lawyers or lawyers' clerks, after waiting for one or two hours, find that no second judge is in town, or if there is, he does not come to the Hall. Valuable time, very many hours in the aggregate, of the best working time of the day, is thus lost to practitioners, whose time is essentially money; and very often cases are thrown over to another Assize, to the pecuniary detriment and annoyance of the parties to the suit, perhaps resulting in the loss of the debt. We do not say that this is anyone's fault, but it is to many a source of annoyance, trouble and loss. One would scarcely think it necessary to mention it, were it not that it is the fashion for some persons to ignore the importance of Chamber business, that the due preparation of cases for trial and the routine work in Chambers are scarcely inferior in importance, except in reference to the attendant expenses, to the trial of cases at the Assizes.

One of two things must be done or the public business will continue to suffer, for time works no change for the better. Either the judges must so arrange their circuits, if that be possible, so that there may always be a judge in town to hold Chambers, in addition to the judge presiding at the Toronto Assizes; or else the Legislature must make some other provision for the transaction of the business, by appointing, or authorising the judges to appoint some person to decide cases in Chambers, when it is impossible or inconvenient for the judges to attend. How this is to be done is unfortunately not very clear, and there are formidable difficulties to the suggestions which present themselves. If a barrister in good practice, and none other would be fit for the work, should be appointed, it would interfere with his business. An extra judge, the most natural mode of meeting the difficulty, would entail expense which might be objected to, even if minor difficulties as to his position with respect to the other judges, and his other duties as a judge would be satisfactorily arranged. There is, however, a "wrong," and a "remedy" must be found.



## ELECTIVE JUDICIARY—ACT FOR QUIETING TITLES.

## ELECTIVE JUDICIARY.

The State of New York was, we believe, the first to open the judicial office to the choice of the people by annual election. It is now proposed by a new constitution, which is shortly to be submitted to the direct vote of the people, to provide for the establishment of a Court of Appeal, to consist of seven judges holding their office for fourteen years. This would be a great improvement, but it is further proposed, after 1873, to vest the appointments of these judges in the Governor of the State, to be held during good behaviour. The better class of the profession and order-loving citizens are anxiously looking forward to a return to the old English system, by which alone, as is remarked in a leading American law periodicals, "the bench can permanently retain its independence or its respectability." The evils resulting from the present system and the corruptions of the judiciary of New York were some time ago exposed in the most scorching way by the *American Law Review*, in language which seemed to despair of any improvement. When, however, a nation, boastful and bigoted though it be, begins to acknowledge that it has made mistakes, there is still it may be hoped a chance of improvement.

## ACT FOR QUIETING TITLES.

We have already given our readers a sketch of the proofs of title required by the Referees under the above Act, and which are spoken of more at length in Mr. Turner's book. It will be useful to many of our readers, to republish the preliminary requirements of the Referees, printed by them as instructions for those taking advantage of the Act. This will be found very handy for constant reference by practitioners and clerk, as well when taking proceedings to quiet titles, as in the ordinary routine of searching a title.

The instructions are as follows:—

1.—The affidavit of the petitioner under the 6th section of the Act. (For form, see Turner on Titles, 58.) The affidavit should also state whether the petitioner is married or not.

2.—The certificate of his Counsel or Solicitor, under the 8th section of the Act.

3.—The County Registrar's Certificate of the state of the title up to the time of registering a certificate of the petition being filed.

4.—All deeds and evidences of title in the petitioner's possession or power. (See Act for Quieting Titles, sec. 5, sub-sec. 1.)

5.—If the petitioner cannot produce all the deeds relating to the land, under which he derives title, he must procure and produce:—

(a.) Certified copies of the memorials (with affidavits of execution) of all other registered instruments affecting the title.

(b.) Affidavits of diligent search for the originals of all deeds to which these memorials relate, and of all other deeds relating to the title which are not produced.

(c.) Proofs of contents of the non-produced deeds. Those of which there are memorials in the short form in use before the late Registry Act should be shown to have contained no trust, limitation, condition, exception or qualification not mentioned in the memorial.

6.—If any of the deeds have no receipt for consideration endorsed, there must further be produced some proof of payment of the consideration.

7.—If there is no release of dower by the wife of a former owner, shew that he was unmarried when he conveyed, or that his wife is dead; otherwise the Certificate of Title must be subject to her dower.

8.—Affidavits are required showing that possession has always accompanied the title under which the petitioner claims. (See Consolidated Order, 501.) Also affidavits showing who is now in occupation, and under what title or claim of title.

9.—Sheriff's certificate that the property is not affected by any execution, sale under execution, or tax sale. (See Turner on Titles, 7, 68, and 64.)

10.—Treasurer's certificate that there are no taxes in arrear and that there has been no sale for taxes.

11.—Collector's receipt for any taxes that are not shewn by the Treasurer's Certificate to have been paid.

12.—Certificate or affidavit that there are no Crown debts affecting the property. (See Com. Stat. U. C. c. 5; 29 & 30 Vic. c. 43.)

13.—A concise statement of any other facts necessary to make out the title and affidavits or other evidence to prove the same.

14.—Schedule of the particulars so produced.

## LATE LORD JUSTICE CLERK OF SCOTLAND—SELF-SATISFACTION EXTRAORDINARY.

## SELECTIONS.

## THE LATE LORD JUSTICE CLERK OF SCOTLAND.

The body of the Lord Justice Clerk of Scotland was recovered from the bed of the river Almond, just below Buchanty Spout, on Friday last, and we regret to say that no doubt can be entertained that the unfortunate gentleman met his death by his own act. The *Scotsman*, after giving full details of the recovery of the body by the exertions of Malloch, the Perth boatman, says that on being brought to the bank the body was taken charge of by Constable Wilson, of the county constabulary. Malloch, the boatman, was immediately driven to Perth, where he communicated his discovery to Mr. Jameson, procurator fiscal, and Mr. Gordon, chief constable of the county. At a quarter past five o'clock the procurator fiscal and Dr. Absolon left Perth for Glenalmond House, for the purpose of making a *post-mortem* examination.

After the discovery of the body, the spot where the razor case and necktie were found on Tuesday afternoon was visited with renewed interest. It now seemed but too evident that the case had been one of suicide, and the whole circumstances pointed to the inference that there had been deliberate premeditation. It will be remembered that the articles referred to, were found on a bank overhanging the fall of Buchanty. The deceased appears to have advanced to the edge of the bank, which stands about five or six feet above the torrent, to have there cut his throat, and then allowed himself to fall backwards, instinctively clutching, as he fell, the ash sapling growing on the bank, which was subsequently found with bloody finger-marks. The body would be swept at once into the deep pool below the linn, from which it subsequently drifted downwards to the pool where it was discovered.

The Right Hon. George Patton was the third son of James Patton, Esq., of Glenalmond, sheriff clerk of Perthshire, by Anne, daughter of Thomas Marshall, Esq. He was born at Perth, in 1803, and was consequently in his sixty-seventh year. He received his early education at the academy of that city, from which he was sent to the University of Edinburgh, and subsequently to Trinity College, Cambridge, where he took the English declamation prize. He was admitted a member of the Faculty of Advocates in 1828. His politics were staunch Conservative, and when Lord Derby came into office in 1859, he was appointed Solicitor-General for Scotland. In 1866, he became Lord Advocate, and was elected member for Bridgewater, which he contested twice at great expense. In the same year he was raised to the dignity of Lord Justice Clerk in room of Lord Colonsay as Lord Justice General. About the same time he was made a member of the Privy

Council. He was married in 1857 to Margaret, daughter of General Alexander Bethune, of Blebo, who survives him, and who has no issue. The paternal estate of Glenalmond has been occupied by three brothers in succession—first by James Patton, second by Thomas (who died suddenly three weeks ago), and most recently by the late judge. It will now, in all probability, pass to the unmarried sister of his Lordship, who resides in Perth, and is the only survivor of the family.

It is stated that the vacant office of Lord Justice Clerk has been offered to the Lord Advocate (Mr. Moncreiff), and that he has intimated his acceptance of it.

## SELF-SATISFACTION EXTRAORDINARY.

Clement Harwood, with the aid of forgery and the falsification of books, robbed his employers of £15,000. His name was placarded all over the country, and a reward was offered for his apprehension. He was captured in New York, brought to England, charged before the Lord Mayor, and superabundant evidence was offered in proof of the guilt of the prisoner. At an adjourned examination the counsel for the prosecution was instructed to withdraw the charge, explaining that the prisoner, who is the son of the senior partner of the firm he robbed, was to be sent abroad. The Lord Mayor dismissed the case, and Clement Harwood was free. We suppose that it would not be easy to cite a more palpable instance of the miscarriage of justice. Because Clement Harwood has rich connections he escapes from the punishment that would surely have happened to a thief whose connections were poor. So far as we are aware, no one has attempted to defend the conduct of the Lord Mayor. What of that? His Lordship is perfectly satisfied with his own conduct. On Monday a deputation from the ward of Walbrook presented him with his portrait. His Lordship said 'There was not one matter which had been brought before him in his magisterial capacity with respect to which he could feel the slightest regret.' Happy Lord Mayor! What a comfort it is to have faith in one's own infallibility! His Lordship added, 'He did not hesitate to say that of all the cases that had come before him none had produced, in the result, greater satisfaction in his own mind than that of Clement Harwood.' This is perplexing. Grant for a moment that the conduct of the Lord Mayor was proper, we are still at a loss to understand why the dismissal of that prisoner should have delighted the worshipful chief magistrate of the city of London. If we are driven to suggest a possible solution of the enigma, we can only assume that the Lord Mayor felt an exquisite delight in being able to save the son of the senior partner of a city firm from penal servitude. His Lordship further said: 'There was not a man in this

## CONTRACTS ENTERED INTO, &amp;c.—“ORDINARY” OR “PERSONAL” LUGGAGE, &amp;c.

country who thoroughly understood the principles of law who would not have endorsed the course he took after having, like himself, mastered the whole of the circumstances. Can we not utilise this Solon of the age? Can we not have a special Act of Parliament constituting his Lordship Lord Chancellor or Lord Chief Justice of England? At the risk, however, of being charged with legal incapacity by Lord Mayor Lawrence, we venture to tell him that there is not a man in the country who thoroughly understands the principles of law who does not condemn the course his Lordship took in the case of Clement Harwood. Were any circumstances known to the Lord Mayor that were not mentioned in open court? We trust not, for it would be a scandalous breach of magisterial duty to decide a case upon private information. All the facts that came before the public were, that Clement Harwood was guilty of forgery and theft, and that the Lord Mayor dismissed the case. His Lordship now avows that he is perfectly satisfied with that result. We hope that he is an exception, and that his aldermanic brethren do not agree with him; for if so, we should earnestly advocate the immediate appointment of stipendiary magistrates for the City of London. In the event of a vulgar forger or thief being brought before the present occupant of the Mansion House, we wonder, if the prisoner cited the case of Clement Harwood, whether his Lordship's mental satisfaction would be disturbed. —*The Law Journal*.

## CONTRACTS ENTERED INTO ON FAITH OF ANOTHER'S REPRESENTATIONS.

*Skidmore v. Bradford*, V.C.S., 17 W. R. 1056.

The distinction between a mere voluntary promise or *nudum pactum* that will not support an action and a promise, upon the faith of which another does some act or enters into some engagement, was considered by Lord Erskine, in *Crosbie v. McDoual*, 18 Ves. 148, which was followed in *Skidmore v. Bradford*. In *Crosbie v. McDoual* A. promised to purchase a house for B., but requested B. to enter into the contract of purchase in her own name. B. did so, and the obligation thus incurred by her on the faith of A.'s promise was held to imply a promise to reimburse B. any part of the purchase-money she might be called upon to pay. And this promise A.'s assets, after his death, were held liable to make good.

*Skidmore v. Bradford* was exactly the same case. The testator purchased a warehouse for his nephew, paid part of the purchase-money, and induced his nephew to render himself liable to pay the rest. Having incurred this obligation on the faith of the representation of the testator that he would pay the rest, the nephew was held entitled to have the balance paid out of the testator's assets. As Lord Erskine pointed out long ago, the Statute of Frauds did not touch the case. It was not

an engagement to answer for the debt of the nephew, but it was a debt incurred by the nephew on the faith that the testator would see it paid.

It would seem that any representation on the faith of which a liability is incurred may give the person incurring the liability the right to have the representation made good: *Hammerley v. De Biel*, 12 Cl. & F. 45. But a mere volunteer cannot require an act of bounty commenced by a testator to be completed by his executors; in order to do so, he must, at the request of the testator, have placed himself in the position of liability from which he asks to be released at the testator's expense. This distinction is essential.—*Solicitors' Journal*.

## “ORDINARY” OR “PERSONAL” LUGGAGE—LIABILITY OF R. R. Co.

*Hudston v. Midland Railway Co.*, Q. B., 17 W. R. 705.

This is a case where the question, what is personal luggage? has again been raised. The defendants' private Act allowed passengers to carry a certain weight of “ordinary luggage” (called in their regulations “personal” luggage) free of charge. The plaintiff brought to the defendants' station a “spring horse,” an improved kind of rocking horse. The defendants refused to allow him to carry it as personal or ordinary luggage, and compelled him to pay for its carriage as merchandize.

The plaintiff endeavoured in a county court to recover damages from the defendants for refusing to take this spring horse. The county court judge held that the spring horse was not personal or ordinary luggage, and decided in favour of the defendants, and this decision was affirmed by the Court of Queen's Bench.

The question what is personal luggage has often arisen before, and there have been a good many decisions upon the subject.

Papers and bank-notes carried by an attorney for use in causes in which he was professionally engaged, *Phelps v. Lyndon & North Western Railway Co.*, 13 W. R. 782, and the sketches of an artist, *Mytton v. The Midland Railway Co.*, 7 W. R. 787, have been held not to be “ordinary luggage.” So also it has been decided that a box containing only merchandize, *Cahill v. London and North Western Railway Co.*, 9 W. R. 891, and a number of ivory handles packed up with personal luggage, *The Great Northern Railway Co. v. Shepherd*, 21 L. J. Ex. 114, 286, are not personal luggage.

These are not the only decisions on the point, but they are the cases that are most frequently referred to. In none of these cases is there any satisfactory definition of either “personal” luggage or “ordinary” luggage; indeed it is perhaps impossible to define what may be fairly considered as comprised by those terms.

## MULTIPLICITY OF AMERICAN REPORTS.

The consequence of this state of the law is, that it is very difficult for any one to know whether he is entitled to have his luggage carried free of charge, and yet if he carries as personal luggage articles which do not come within that term he cannot recover anything from the railway company for their loss. It must also be remembered that now that railway travelling is so very common many people, and perhaps the majority of travellers, always carry much that can scarcely be deemed personal luggage. Books, presents, articles belonging to third persons; things that are required in professions and trades, as the papers of merchants, agents, lawyers, and artists; the guns and fishing-tackle of sportsmen, the tools of artisans, &c., &c. Such things are of necessity frequently carried, and yet it is by no means easy even for a lawyer to say off-hand whether they are or are not personal luggage.

It seems to us that a great improvement might be made by adopting the system of giving a fixed sum per pound for any luggage which is lost irrespective of its nature or of its actual value.

If any traveller wished to carry luggage of a value greater than the amount of compensation fixed for cases of loss he might declare the nature and value of the luggage and pay for its carriage, and then be entitled, in case of loss, to recover more than the ordinary compensation. A plan of this sort would put an end to all difficulties about personal and ordinary luggage.

This system is not an untried one. It is adopted on many of the Continental lines, and we believe it works very well. It is reasonable that railway companies should not be liable to be called upon to pay large sums for the loss of luggage of the value of which they were ignorant when they received it, but if the amount of their liability is fixed it matters not to them what is the nature of the luggage carried, except perhaps that they may wish to prevent persons from carrying merchandise as personal luggage. It is, however, impossible to prevent passengers from sometimes carrying merchandise with them as their own luggage, and we think the amount so carried would not be sensibly affected by the alteration that we suggest. The real advantage of the continental plan is that by adopting it the rights of the passenger and the railway company respectively can at once be ascertained without having recourse to litigation.—*Solicitors' Journal*.

## MULTIPLICITY OF AMERICAN REPORTS.

We have adverted generally to the very great embarrassment to the practitioner arising from the already great multiplicity of the American Reports—State and national. We reproduce from the *Western Jurist* an article written with great care, which gives with particularity and detail, a forcible statement

of the extent and gravity of the growing evil. We do not think the scheme outlined by our contemporary perfectly feasible, nor, if it were, that it would be more than a palliative. The vice is a radical one of principle, not of method. The difficulty is not that Courts numerous beyond precedent elsewhere, and diverse in character beyond the experience of any other people, should be reported, as they often are, with prolixity, but that these Courts themselves should go on multiplying with a fecundity equal to any productive force in nature. The great difficulty, and one that will ultimately have to be met, is the diversity of the Judicial systems of the several States. The dream of an entire uniformity in the administration of justice in the United States is not only not chimerical, but is an absolute necessity in the future. Who can contemplate the intricacies which grew up in the British jurisprudence, in an inactive age and amongst a stable people, without a shudder at the interminable involution and complexity of the American jurisprudence, if the present system prevails, fifty years hence? The labyrinths in which the bewildered Theseus wandered in classic story were nothing to the meshes which would have to be unraveled by any one who would aim to take a comprehensive survey of the judicial systems of the several States, and their involved relations with the national Courts. To suppose that we are to have no remedy for this possible state of things is to affront the common sense of mankind. We have no doubt that it is demonstrable by any one that will take the trouble to work out the ratio, that if States increase in numbers as heretofore, and Courts are organized with the same regard to locality that all the rescripts and decretals of all the ages of the Roman empire, east and west, and the whole weight of the British decisions superadded, are not a circumstance to the amorphous mass we shall have accumulated by the year nineteen hundred and twenty.

There is no question but that, while the progress of civilization is simplifying, and making more cunning the instruments with which mankind accomplish what before was done clumsily and with travail, the tools with which the American and the British lawyer work are becoming infinitely more cumbrous and unwieldy. This is abnormal. The intricacy and complexity of the affairs of modern life are already sufficiently great without adding to the difficulty by a vicious system. Napoleon prided himself more upon having systematized and codified the laws of France than upon his victories. And his beneficent work was but a bagatelle compared to that of him who shall unite to clearness of intellect the force and energy of character which shall enable him to perform a similar work for the United States. The difficulties are prodigious. State lines would seem to present an insuperable barrier. Under our present system coercion is out of the question. But force is.

C. L. Cham.]

SUMMERVILLE V. JOY ET AL.

[C. L. Cham.]

not a necessary element. Given a beneficent and useful idea, and the pervasive intercourse of the age works wonders. Certainly in an age which entertains the idea of conventions which shall bring the whole world under a uniform system of public law, the idea of giving simplicity and uniformity to the administration of law throughout the United States, is not quixotic. We have a firm belief that, whatever the difficulty and whatever traditions are disturbed, the change must be and will be effected. The possible spectacle of five thousand *Fora* in the United States administering perhaps a hundred different and clashing systems of law, fifty years hence, is an idea a hundred times more objectionable than such an exertion of the degree of constraint necessary, in exceptional instances, to prevent the absurdity.

We are led to indulge this vein of thought by the assembly of Jurists at Heidelberg, the other day. A leading object of the Convention is to introduce uniformity into the German system of Jurisprudence. May all honor attend Bluntschili and his illustrious compeers in their good work, and may we Americans catch their spirit before our judicial experience is like those unhappy victims of old who floundered about in the

“—— Great Serboman bog  
Betwixt Damietta and Mt. Cassius old,  
Where armies whole have sunk.”

—*Pittsburg Legal Journal.*

## ONTARIO REPORTS.

### COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

#### SUMMERVILLE V. JOY ET AL.

*Notice of trial by proviso.*

The defendants having given notice of trial by proviso, claiming that the plaintiff had made default in not proceeding to trial within due time after a new trial had been ordered; the question, whether there had been, under the circumstances, a default such as to enable the defendants to give this notice considered, but not decided.

*Quære*: whether notice of trial by proviso has been abolished in this country.

[Chambers, Oct. 1, 1869.]

W. Sydney Smith for the plaintiff obtained a summons to set aside notices of trial by proviso, under the following circumstances:—The venue in this cause was laid in the County of Brant. The action was commenced on the 19th of March, 1868, and was tried on the 21st April, 1868, when a verdict was rendered for the plaintiff, for one thousand dollars damages.

The defendants moved for and obtained a rule absolute for a new trial on payment of costs in Hilary Term last, about the 6th day of March last. The costs were taxed and paid by the defendants on or about the 10th day of April last, in time to let the plaintiff go to trial at the next assizes if he so desired. Only one assize was held for the County of Brant since that date, namely on the 26th day of April.

On the 20th day of September last, notice of trial by proviso and issue book were served, but no other proceedings were had in the cause since the payment of the said costs, nor did the defendants give any twenty days notice to the plaintiff to proceed, nor did they obtain any rule of court enabling them to proceed with the trial of this cause.

The plaintiff alleged that it was his intention to proceed to trial at the next Brant Assizes, if he could procure the attendance or evidence of a witness that he said was material and necessary.

The grounds of irregularity mentioned in the summons were:—1st. That no twenty days notice was given by defendants or either of them to plaintiff to proceed to trial.

2nd. That a trial having been once had, no such notice can or could at present be given to plaintiff.

3rd. That the costs, upon payment of which defendants obtained a new trial, were only paid in vacation preceding Easter Term last, and plaintiff has same time to proceed as if issue then joined, and no assize has passed since Easter Term, this cause being a country cause.

4th. That no notice of trial could be so given until plaintiff was in default under section 217 of the C. L. P. Act, and he was not so at the time of such services. And plaintiff, not having up to present time neglected either to give notice of trial, or to bring the cause on to be tried at the assizes following said Easter Term, is not subject to such notice to proceed, or of trial, or notice of trial by proviso.

The summons also called on the defendant to shew cause why the time for proceeding to trial herein should not be extended over the present ensuing assizes for the County of Brant, to the next Spring Assizes for said county, on grounds of absence of a necessary and material witness for said plaintiff, and the impossibility of procuring his evidence by commission or otherwise at the next assizes, or why such order should not be made for relief of plaintiff, as to said presiding judge might seem meet, on grounds disclosed in affidavits and papers filed.

J. A. Boyd shewed cause. The defendants were entitled to give notice of trial by proviso, owing to the lapse of time since issue had been joined, and for the default of the plaintiff in not having gone to trial at the Spring Assizes as he might have done.

Smith *contra*. There was no default as the case had been once tried, and the defendants could not proceed either by proviso or twenty days notice. In any case they were not bound to go to trial before the Fall Assizes.

The cases cited are referred to in the judgment of,

Gwynne, J.—By the Imperial Common Law Procedure Act, 1852, sec. 116, it is enacted that “nothing herein contained shall affect the right of a defendant to take down a cause for trial after default by the plaintiff to proceed to trial, according to the course and practice of the court.”

The 42nd rule of H. T. 1853, establishes the practice of the court thereafter to be that “no trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary.”

C. L. Cham.]

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Our statute has no section similar to the 116th section of the Imperial Act, and the 227th section which makes a provision in substitution for the abolished practice, of moving for judgment as in case of a nonsuit, makes statutory what was provided for by rule 42 of H. T. 1853, in England, for it enacts that no rule for trial by proviso shall be necessary. Why there should be this difference between the two acts is not apparent. If our statute contemplated abolishing trial by proviso altogether, and making the 227th section a substitute for that also, one would suppose that instead of abolishing the rule for a trial by proviso, they would have abolished the trial by proviso itself.

It would seem that our courts do not consider that the trial by proviso is abolished, for we have also a rule which is in the words of the statute, that "no rule for trial by proviso shall be necessary."

In Chitty's Archbold, 11th ed., p. 1488. it is said, "it would seem that after the plaintiff has once tried the cause, he cannot be compelled to proceed to trial under the new Act," that is, under the clause in C. L. P. Act of 1852, similar to our 227th clause. No case is cited there in support of that dictum, but *Oakeley v. Ooddeen* 11 C. B. N. S. 805, has been cited to me as supporting it. The case does not so decide in terms. The point did not precisely arise, and in fact, in one stage of the cause, notice had been given as if the section did apply, but upon its being given, the plaintiff also gave notice of trial, and the case was taken down, but went off for want of a jury, and the plaintiff took the case down for trial again, when the jury, being unable to agree, were discharged. What the case does decide is that where the plaintiff is not in default, there can be no trial by proviso, and that the plaintiff was not in default there, for he had taken the case down to trial, and it was no fault of his that a verdict had not been rendered. Mr. Smith dwelt strongly upon the language of Byles, J., in that case, viz.—"where a new trial is ordered, the plaintiff is in the same position as to proceeding to a second trial, as he was when issue was first joined." Mr. Smith, upon this contended that after a new trial was ordered, the plaintiff had the same time to go down to trial from the granting of the order, as he had from the joining issue, and the marginal note of the case supports this view. I think all that Byles, J. meant is explained by the next sentence in his judgment, that the plaintiff must, after the new trial is granted, "be guilty of a default before the defendant can interpose, &c." I think, however, that there is good ground for contending, from the terms of the 227th section of our act, that it does not apply to a case where there has been a trial—that is the conclusion which I think would be arrived at in England, upon the similar clause in the Imperial Act; but the Imperial Act specially preserves the practice of trial by proviso, which our act does not; and it may be contended that the omission in our act is intentional and that the trial by proviso as well as judgment in case of a nonsuit, is abolished, in which case our 227th clause must apply to a case where a new trial has been ordered, or the defendant will be without remedy. If I should decide now that trial by proviso is done away with, and that

the plaintiff must proceed by a notice under the 227th clause, he could only obtain redress by appealing, and in the meantime he would be deprived of the right which is his, of proceeding to trial by proviso, if that mode of trial is not done away with, whereas, if it is done away with, the plaintiff can as effectually move after the nonsuit, if the plaintiff should suffer himself to be nonsuited, as now. If the 227th section does not apply where there has been a trial, then the time which by that section must elapse before the defendants can give the notice, is not the time which must elapse before he can give notice of trial by proviso, if that mode of trial still exists, unless that be also the time which must elapse according to the practice of the court, independently of this section, before the plaintiff is in default. Here an assize has elapsed since the new trial was ordered, and since the costs by the rule granting the new trial ordered to be paid have been paid. *Oakeley v. Ooddeen*, does not decide, and no case has been cited to me which does decide that the suffering that assize to elapse is not a default which entitles the defendants to proceed to trial by proviso, if that mode of trial is not abolished. The case of *The Staffordshire &c. Canal Company, v. The Trent and Mersey Canal Company*, 5 Taunt. 577, seems to imply that such a default does entitle the defendants to give notice of trial by proviso. I am not prepared to say that this mode of proceeding is abolished. I am not prepared to say that the defendants can and must proceed by a notice under the 227th section. I shall not therefore pronounce the service of the notice of trial to be an irregularity. I shall leave the plaintiff to elect whether he will proceed or not with the trial, and move against a nonsuit, if that should be the result. It is a point proper for the court to determine, and I shall not make an order which might probably deprive the defendants of what might prove to be their right. The defendants may proceed at their own risk of having their proceeding set aside by the court, if it should be of opinion that the trial by proviso is irregular, for if irregular, the irregularity, as it appears to me, is one constituting a nullity.

As to that part of the summons which asks as an alternative to put off the trial—upon the present material I cannot grant that because the plaintiff swears that he intends to proceed to trial himself at the next assize, if he can get the witness spoken of—it may be that he will get him—and if he cannot get him, and if the plaintiff cannot proceed to trial without him, the plaintiff can renew his motion to put off the trial before the judge at Nisi Prius; but while there is acknowledged to be a doubt whether he can be got or not, I should not, I think, put off the trial absolutely.

The proper order I think to make, under the circumstances, will be to discharge the summons without costs, leaving the parties to determine what course they will respectively pursue, and leaving to the court the question which this motion raises, and which is new in practice. If the plaintiff should resolve to let the defendants proceed, and should suffer a nonsuit, he can when moving against the nonsuit, appeal against my order, if he thinks his omitting to do so can in any way prejudice his right to move to set aside

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the nonsuit. If the plaintiff should get his witness, he may himself, if he pleases, give notice of trial; or if he cannot get his witness he can, if he pleases, renew his motion to put off the trial.

*Order accordingly.*

### CHANCERY.

(Reported by F. W. KINGSTONE, Esq., Barrister-at-Law.)

RE TATE.

*Dower Act of Ontario.*

The Dower Act of Ontario, 32 Vic. c. 7, sec. 3, is retrospective in its effects.

[V. C. M., Sept., 1869.]

One Tate applied, under the Act for quieting titles, for a certificate of title to a lot of land in the county of Kent. It appeared that one Ludovick Hartman, on the 29th March, 1840, conveyed the said lot of which he was then seized in fee, to a person through whom Tate claimed.

There was no evidence to show that Hartman was single when he conveyed, or that, if then married, his wife had since died. But on behalf of the petitioner it was submitted, that such evidence was unnecessary, as it was sworn that on the 1st March, 1860, ten years subsequent to Hartman's conveyance, the lot was in a state of nature and unimproved, and that consequently Hartman's widow (supposing her to exist, and to otherwise be entitled to dower) would be deprived of her right to dower in this lot by 32 Vic. c. 7, s. 3, Ontario, the first part of which enacts that "Dower shall not be recoverable out of any separate and distinct lot, tract, or parcel of land, which at the time of the alienation by the husband, or at the time of his death, if he died seized thereof, was in a state of nature and unimproved, by clearing, fencing or otherwise for the purpose of cultivation or occupation."

On the papers being laid before Mowat, V.C., for a certificate, he expressed a doubt whether the above clause of the Dower Act was retrospective in its operation, and directed that the point should be argued before him.

Accordingly on the 2nd September, 1869,

Kingstone, appeared for the petitioner.

The general rule that statutes ought not to be construed retrospectively is admitted, but the ground of that rule was the injury to vested rights that would be occasioned by a different construction, and therefore when provision was made for vested rights, the rule did not apply. In the statute under consideration, such provision was made, for 1st. The period for the Act taking effect was postponed from the 19th day of December, to the 1st day of February following: and 2nd By the 24th sec. all actions of dower which should be pending when the Act comes into force may be continued and carried on to judgment in like manner as if the Act had not been passed. It is clear, therefore, that some provision was made for vested rights, and the court could not enter on the question of the sufficiency of the provision made by the Legislature. See *Towler v. Chatterton*, 6 Bing 258; *Reg. v. Leeds & Bradford R. Co.*, 18 Q. B. 348; *Duarris on*

Statutes, 542; *Doe dem. Evans v. Page*, 5 Q. B. 772.

The rule will yield to the intention of the Legislature where that intention clearly appears. And such an intention clearly appears here, for, 1. The words of sec. 3, are unlimited and are applicable to vested interests, the word "was" being used instead of the words "shall be." 2. By sec. 24 pending actions, and by sec. 42 certain vested interests, are excepted from the operation of the Act, even where it does come into force generally, and there would have been no occasion to make such exceptions if it was not intended that the Act should be retrospective in other respects. 3. Some portions of the Act, for instance sec. 23, must on the face of them have been intended to be retrospective.

Mowat, V.C., reserved judgment, and subsequently instructed the Referee to make the certificate free from any reservation for dower.

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#### CHANCERY.

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*Wills Act (1 Vict. c. 26, s. 26)—Will and Codicil not found at death—Presumed to be revoked—Probate granted of subsequent Codicil.*

A. died having made a will and codicil, neither of which on his death was found. But a second codicil duly executed was found. It recited that the testator had already bequeathed to his grandchildren everything upon or relating to a certain farm. The question was whether that second codicil could be admitted to probate, or whether it fell with the will.

Held, that as this codicil had not been revoked by any of the modes indicated by the Wills Act (1 Vict. c. 26, s. 26) as the only means by which a codicil can now be revoked, it was entitled to probate.

[17 W. R. 1108].

The testator, Ebenezer Black, late of Grindon, in the County of Northumberland, died on 8th of May, 1868.

He made a will in February, 1865, and added a codicil in October, 1866. The codicil gave an annuity of £100 instead of a bequest of fifty shares in the West Hartlepool Dock and Railway Company which he had given in the will to his daughter Ann Jobling, and directed his trustees to dispose of his interest in his farm in Tenham-hill, together with the farming stock, &c., and to hold the proceeds arising therefrom in trust for the five children of his daughter Ann Jobling. Subsequently, by a deed of gift dated May 27, 1867, he "gave and devised" the same farm of Tenham-hill to his daughter and her children.

On the 19th of October in the same year he executed another codicil as follows:—

"I Ebenezer Black farmer Grindon in the parish of Norham in the County of Northumberland having already bequeathed to my five grandchildren issue of my daughter Ann Jobling to wit Mary Thomas Jane William and Ann Jobling the lease stock and profits with everything upon or relating to the farm of Tenham-hill they paying all rents taxes and whatever charges may come against the said farm of Tenham-hill in addition to which I now bequeath to each of the above-named children of my daughter Ann the sum of £300 sterling money when they attain

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the age of twenty-one years out of my capital to be paid to them individually by my executors."

This was duly attested.

The will of 1866 and the codicil of 1866 were in the testator's possession, but at his death they could not be found. The defendant, as a legatee named therein, propounded the paper of 19th October, 1867, and the plaintiffs pleaded that it was not executed according to the statute 1 Vict. c. 26; that if well executed, it was executed as a second codicil to his last will and codicil; and that he destroyed them with an intention to revoke them and also the said alleged codicil.

The case was heard before Lord Penzance on May 29.

*Dr. Deane, Q. C., and Pritchard*, appeared for the plaintiff; and *A. Staveley Hill, Q. C. and Triustram, Dr.*, for the defendant.

J. H. Mitchell proved that the testator called at his house to ask him to draw a codicil to his will; that he did so, and that it was duly attested; and that the testator said that his capital was increasing, and that he had £1,100 he wished to leave to his daughter's family, and that he had already given them a farm and the stock upon it.

June 29.—Lord PENZANCE, after reciting the facts of the case, said:—The general proposition relied on against the codicil was that a codicil stood or fell with the will; that, no doubt, was a general proposition which was obtained in the Prerogative Court. I took the trouble to ascertain what under the old law were the exceptions, although the result of the case does not appear to me to be very satisfactory.

The earliest case is that of *Barrow v. Barrow*, 2 Lee. 885. There a testator made a will and a codicil, the whole effect of the codicil being to give the residue of his property to his wife. He afterwards burned the will, saying it was useless. The Court there held that it was clear that the codicil was not destroyed by the burning the will, but was a substantive instrument. The codicil gave the residue, and no one could say what that was, without having read the will, which disposed of the other portion of the property, but the Court, nevertheless, so held.

The next is the case of *Medlicott v. Asheton*, 2 Add. 281, which was decided in 1824. There the will was made in April, 1820, and in December, 1820, the testatrix wrote a codicil giving £100 each to the two trustees named in her will, and dividing some trinkets among her friends. In 1824 she looked over the papers in her writing-desk, several of which she burned, and a few days afterwards wrote to her attorney desiring him to destroy her will. The Court held that it was altogether a question of intention, and that the legal presumption that the codicil fell with the will might be rebutted by showing that the testatrix intended the codicil to operate notwithstanding the revocation of the will, and as the circumstances were not sufficient to establish such an intention, the codicil was held invalid.

The next was the case of *Tagart v. Hooper*, 1 Curt. 289, decided in 1836. The paper was found in the writing-desk of the deceased, and it commenced thus: "This is a codicil to my last will and to be taken as a part thereof." The Court, in pronouncing for the paper, said that

in all cases where the codicil had been considered void by the destruction of the will there were circumstances which showed that the codicil was dependent on the will.

In the other cases it was laid down that the codicil was revoked where the will was revoked; but in this case it was held that where the codicil was so revoked there were circumstances which showed it to be dependent on the will.

These are all the cases on the point before the passing of the statute, and certainly the result is not satisfactory.

The consideration of these cases leaves upon the mind no very definite idea of what is meant by "dependent on the will." In one sense, any codicil that makes any disposition of property at all, must be considered to be dependent on the will which disposes of the rest, for the codicil conveys only a part of the testator's intention regarding his property, and the motives inducing that particular part of his intention cannot with any certainty be dis severed from the motives which induced the disposition of the rest.

It is difficult if not impossible to predicate of a particular bequest in a codicil that the testator would have made it if he had disposed of his other property in any different manner than that expressed by his will. It may be that the independence of the will spoken of must be something of a more limited character. And the meaning of the cases may be that a codicil is independent of the will unless it is of such a character that the giving validity and effect to it without the will to which it was intended to be attached would produce some manifest absurdity. I am not sure that even this rule is capable of being easily applied to all the cases that might arise, and I have serious doubts whether such a rule is to be gathered from the cases with sufficient distinctness to justify the Court in adopting it. But all these cases occurred before the Wills Act. Now the section of that Act is most distinct and positive in its terms. "No will or codicil," &c. And I should have had no hesitation in holding that the intention of that section was to do away with all implied revocations and relieve the subject from the doubt and indistinctness in which the cases had involved it. But there have been two cases decided since the Act. The first of these, *In the Goods of Halliwell*, 4 Notes of Cases, 400. The codicil was dated September 6th, 1845, and commenced thus:—"This is a codicil to the will of me R. H. and which I desire to be added to my will," and it related solely to account between himself and his partners, containing no bequest or appointment. The testator died on the 7th of September, 1846, and he expressly declared shortly before the making of the codicil that he had made a will and that it was then in existence. In that case, the Court said that, supposing it all to have been destroyed, the codicil would, upon the general principle, fall with it, but held that there was an exception in favour of the paper, inasmuch as it seemed to have been made for a particular purpose, and admitted to proof. Then comes the case of *Clogstown v. Walcott*, 5 Notes of Cases, 623, in which the will was made in 1840, the codicil in 1842. In April, 1846, he destroyed it all, and in so doing so expressed anxiety about the codicils observing this better. It would not affect the codicils with it. In that



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case for the first time the Wills Act was cited, and the way the learned judge referred to it was as follows:—"Under the old law the effect of destroying a will was by presumption to defeat the operation of the codicil to that will, but by the present law there must be an intention to destroy. Here, however, the deceased did not mean to destroy the codicils, but on the contrary he expected at the time and declared afterwards that the parties mentioned in the codicils would have the benefit of the legacies he had given them. I am of opinion that the Court is bound to pronounce for the solidity of the two codicils and I decree probate of them to the brother who is executor according to the tenor on the first codicil." Since this last was established a case occurred, *Grimwood v. Cozens*, 2 Sw. & T. s. 64, which was heard in 1860, and in that case Sir C. Cresswell said, "I think it has been established by the cases cited at the bar that previous to the passing of 1 Vict. c. 26, a codicil was *prima facie* dependent on the will, and that the destruction of the latter was an implied revocation of the former, and moreover that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the statute. The question there is entirely one of the intention of the deceased. When a will and codicil have been in existence and the will is afterwards revoked it must be shown by the party applying for probate of the codicil alone that it was intended by the deceased that it should operate separately from the will, otherwise it will be presumed that, as the will is destroyed, the codicil also is revoked." In that case the learned judge seems to have taken it for granted that there was no alteration in the principle, and to have decided the case as if it was under the old law.

Now in reviewing these decisions I cannot perceive that the effect of the statute has been fully considered by the Court. Sir C. Cresswell seems to have thought that it had been decided that the statute made no difference, and passed it by as being so. And Sir H. J. Fust discussed the point without any meaning whatever, merely approving that the statute had made it necessary that there should be an affirmative intention to revoke; but the statute says nothing of the kind, and unless it makes an actual revocation necessary it does not interfere with the existing law at all. In this unsatisfactory state of things I think I shall do best in such a case as the present by adhering to the statute, and by holding that as this codicil has never been revoked in any of the modes indicated by the statute as the only modes by which a codicil is to be revoked, it remains in full force and effect and is entitled to probate.

## GIBBS V. HARDING.

*Husband and wife—Separation deed—Agreement for specific performance.*

An agreement in writing between a husband of the one part and the wife's father on behalf of the wife of the other part, that the husband and wife should live apart, and that the husband should execute a proper deed for that purpose, and for securing an annuity to the wife, was signed by both parties and also by the wife, and was acted upon by the separation of the husband and wife, and by payment of the annuity.

*Held*, that this was a valid agreement, and that having been acted upon, the plaintiff was entitled to a decree specific performance.

[17 W. R. 1093.]

This was a suit for the specific performance, under the following circumstances, of an agreement for separation between husband and wife.

Alice the daughter of Joseph Gibbs, was married to Thomas Harding on the 1st of March, 1867. There was no settlement executed upon their marriage, and in consequence of differences which arose between them, they agreed to live apart on the terms mentioned in the following agreement, which was signed by Alice Harding, Joseph Gibbs, and Thomas Harding:—

"Memorandum of agreement made this 5th day of July, 1865, between Thomas Archer Harding of the one part and Joseph Gibbs of the other part. Whereas differences having arisen between the said Thomas Archer Harding and Alice his wife, the daughter of the said Joseph Gibbs and it hath been agreed between the said Thomas Archer Harding and the said Joseph Gibbs, on behalf of his said daughter, that the said Thomas Archer Harding and his said wife should live apart, and the said Thomas Archer Harding doth hereby agree with the said Joseph Gibbs, when thereunto required, to execute and sign a deed of separation to be prepared by Messrs. Bradford & Foote, to contain all usual and proper clauses, and also to secure the sum of £40 a-year to commence from this date, and to be paid by equal quarterly payments by the said Thomas Archer Harding, for the maintenance of his wife and child, but if the said wife should now be in the family way and have another child within eight months from this time, then the sum of £40 shall be increased to £50 to be paid in like manner as the £40 provided for, so long as such child shall live, and the cost of the deed of separation and of this agreement shall be paid in equal portions by the parties hereto."

Alice Harding was not in the family way at the date of the agreement, and had no child born subsequently.

There were four children of the marriage, three of whom died before the separation of Alice and James Harding, and the fourth, Victoria Harding, who was one of the defendants, was an infant of seven years of age, and resided with her grandfather, Joseph Gibbs.

In pursuance of the agreement above mentioned Thomas and Alice Harding lived separately, and the annuity was regularly paid up to October, 1867, to Joseph Gibbs, who brought up the child, and maintained his daughter Alice Harding until she went into service, where she had since remained. In October, 1867, Joseph Gibbs applied to the defendant to execute a deed of separation which had been prepared by Messrs Bradford & Foote, in pursuance, as the bill alleged, of the memorandum of agreement, and which charged the annuity of £40 upon certain real estates to which the defendant was entitled in fee simple, but the defendant declined to execute it.

The bill prayed that the defendant, Thomas Harding, might be decreed specifically to perform the said agreement of the 5th day of July, 1865, and to execute the said separation deed so prepared as aforesaid, or some proper separation deed to be approved by the Court, and to pay the said annuity, and to do all other acts pursuant to the said agreement, the plaintiffs offering specifically to perform the said agreement on

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their part, and in particular to execute a proper deed of separation pursuant thereto, and to be approved by the court, and that an account might be taken of the amount due in respect of the said annuity.

*Greene, Q.C., and Bagshawe*, for the plaintiff, cited *Wilson v. Wilson*, 1 H. L. Cas. 538, 5 H. L. Cas. 40; and to show that the wife was not a necessary party to the agreement: *Williams v. Bailey*, L. R. 2 Eq. 781.

*Dickinson, Q.C., and W. W. Karlake*, for the defendant, contended that the agreement was one which the court could not enforce, as it was entirely without consideration, and was also a mere agreement between the wife's father and the husband, for the wife, as a married woman, could not contract, and her signing was ineffective. Even if the agreement had been binding, the defendant could not have been compelled to execute such a deed as that which was prepared. There was no covenant to indemnify the husband against the wife's debts, which was indispensable to such a deed, and the annuity was charged on particular landed property of the defendant's, although there was no agreement to that effect. Then the annuity was by this deed limited to the wife for ninety-nine years if she should so long live, whereas it should be to her so long only as she and her husband should live apart. This was not like the case of *Wilson v. Wilson*, where there was valuable consideration and a covenant to indemnify against debts. They cited *Walrond v. Walrond*, 7 W. R. 33, John. 18; and *Mormington v. Keane*, 6 W. R. 434, 2 De G. & J. 292.

*Langley*, appeared for the infant.

STUART, V.C.—Said that this was a suit for the specific performance of an agreement for separation, the agreement being made between the father of the wife on her behalf, and the husband. The agreement was signed not only by the parties to it, but also by the wife herself, who was, therefore, no doubt, bound by it so far as a married woman could bind herself by contract. It had been argued that there was a want of consideration and mutuality in the agreement. But there was no doubt that the agreement was perfectly valid. It had been acted upon by the father of the wife who was at that time maintaining the child, and whenever an agreement which was not illegal had been acted upon and obligations incurred upon the faith of it, the Court would see that such an agreement was properly performed. Although there was nothing in the written agreement to justify the charging the annuity upon the land, as had been done by the deed which had been prepared, still the husband would have done better to have executed the deed, and if well advised would do so even then, but if he would not there must be a reference to chambers to settle a proper deed, and for the purpose of securing the annuity. It was with great reluctance that his Honour made a decree at all, as the case was one which should never have been brought into court, but, under the circumstances, there must be a decree for the specific performance of the agreement as prayed, and the husband must pay the costs of the suit.

## ROSS v. TATHAM.

*Breach of covenant—Administration suit—Liability of executors.*

Executors applied in an administration suit to have a sum set aside to indemnify them against a breach of covenant in a lease, committed by the testator, the lessee.

The lessor had taken no action on the covenant, and had not come in under the administration decree.

Held, that the executors were exonerated by the administration decree from liability, and that their application must be refused. [V. C. M., 17 W. R. 960.]

This was a petition by residuary legatees for payment out of court of the residue.

The testator in the cause was lessee of certain property under a lease for ninety-nine years from Christmas, 1860. In the lease was contained a covenant to build within twelve months from the date of the lease a factory of certain specified dimensions, at a cost of not less than £1,800.

The testator died in 1864, without having erected the factory; a bill for the administration of his estate was filed, and a decree for administration made.

No action had been taken by the lessor in respect of the breach of covenant, nor had he come in under the decree.

*Owen*, in support of the petition.

*Wickens*, for the executors, contended that a sum of money sufficient to indemnify them against any liability in respect of the breach of covenant should be retained in court for that purpose. Lord St. Leonards' Act, 22 & 23 Vict., c. 35 does not relieve executors from liability in such a case as this. The covenants referred to in section 27 are only ordinary and usual covenants, and do not apply to an extraordinary covenant which to the knowledge of the executors has been broken: *Morgan*, p. 280. If the executors had been dealing with the estate out of court it would have been their duty to have set aside a fund to answer this liability. The Court will now direct them to do the same.

*Osborne Morgan, Q.C., amicus curiæ*, cited *Thomas v. Griffith*, 9 W. R. 293, 2 De G. F. & J. 555.

*Owen*, in reply, referred to *Bennett v. Lytton*, 2 J. & H. 155. *Williams v. Headland*, 12 W. R. 867, 4 Giff. 495.

*Romer*, for the widow entitled to a life interest.

*Nalder*, for the plaintiff in the cause, supported the petition.

MALINS, V. C., after mentioning the facts, decided that the lessor was a creditor of the testator for unliquidated damages in respect of the breach of covenant, and, as such ought to have brought in his claim under the administration suit. As he had not done so, he had lost his remedy against the executors, and must follow the assets. A contrary decision would give rise to the greatest inconvenience, and in this case the argument went to the extent of asking the Court to retain the money till the determination of the lease. His Honour could not accede to the application of the executors, who were, in his opinion, exonerated from liability; and, resting on the authority of *Bennett v. Lytton* and *Williams v. Headland*, made the order as prayed.

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OGLE V. KNIFE—CLARKE V. PECK.

[U. S. Rep.]

## OGLE V. KNIFE.

*Will—Words—Bank stock—Money and securities for money*  
Bank stock is not comprised in a bequest of "money and securities for money."

[17 W. R. 1090.]

This was a special case, one of the objects of which was to determine whether certain Bank stock passed by the will of Elizabeth Furniss under the description of "moneys and securities for money" or was comprised in the testatrix's general personal estate.

*Amphlett, Q C.*, and *Chitty*, for the plaintiffs, contended that the Bank stock passed under the residuary bequest contained in the testatrix's will.

*Everitt and Babington*, contra.

*JAMES, V.C.*—It appears to me to be utterly impossible to hold that Bank stock, which is after all nothing but a share in the capital of a company, incorporated by Act of Parliament for the purpose of carrying on a banking business, is any more a security for money than a share in any other partnership. It is merely a share in an incorporated partnership, with certain privileges with regard to discounting bills and so on. It is really as much a share in a company as any co-partner's share in a brewery is. Therefore, clearly, Bank stock does not pass as security for money.

## UNITED STATES REPORTS.

## SUPREME COURT OF VERMONT.

*Windham County; February Term, 1868.—In Chancery.*

**LOUISA CLARK & FERSENDON CLARK V. SHUBAEL PECK & TULLY A. CLARK.**

(*Chicago Legal News.*)

**HUSBAND AND WIFE.** *Notice.*—Where the use of property is given to a married woman, she takes it independent of the marital rights of her husband, and a court of equity will restrain his creditors from coming in, and attaching and disposing of the property or its products in payment of the husband's debts.

Where a testator in his will provided for the payment of his debts, and the support of his widow, and gave a specific legacy to one of his sons, and then said, "I also give to my daughter, Sophronia Clark, one third of the residue of all my estate, both real and personal. I also give the use of the other two thirds of my estate, both real and personal, to Louisa Clark, the wife of my son Tully A. Clark, so long as she shall remain his wife or widow, and when she shall cease to remain his wife or widow, to the lawful heirs of the said Tully A. Clark," it was held that the said Louisa took the property thus bequeathed to her, to her separate use, and not subject to the marital rights of her husband, and, being in the possession and occupation thereof she is clearly entitled in equity to the products thereof, and to be protected against any attempt, on the part of her husband's creditors, to deprive her of it.

Her title under the will was a matter of record. She was in possession, and that was at least constructive notice to all the world of her right.

The bill set forth that on or about the 10th day of September, 1841, the oratrix, Louisa Clark, married Tully A. Clark, her present husband, and ever since said marriage said Louisa and Tully A. have lived, and still do live, together as husband and wife, and have now living three lawful minor children; which was admitted in the

answers of the defendants. On or about the 25th day of April, 1850, Perez Clark, the father of Tully A., since deceased, made and executed his last will and testament, containing \* \* \* \* among other provisions the following:

"I also give the use of the other two-thirds of my estate, both real and personal, to Louisa Clark, the wife of my son Tully A. Clark, so long as she shall remain his wife or widow, and, when she shall cease to remain his wife or widow, to the lawful heirs of the said Tully A. Clark.

"And I hereby nominate, constitute and appoint my son, Tully A. Clark, to be executor of this, my last will and testament.

\* \* \* \* \*

The case was heard on bill, answers, replication, and proofs, at the September term, 1864, Barrett, Chancery.

Inasmuch as the property was receipted, and has remained in the possession of the oratrix, an injunction simply restraining the defendant Peck from pursuing it, was all that seemed necessary. It was therefore ordered that a decree be entered for a perpetual injunction to that intent and effect, and for the oratrix to recover costs of the defendant Peck.

Appeal by the defendant Peck.

Butler & Wheeler, for the defendant Peck.

The will of Perez Clark does not limit the use of two-thirds of the farm to the oratrix, to the exclusion of the marital rights of her husband. *Brown v. Clark*, 8 Ves., 166; *Houghton v. Haggood*, 18 Pick., 154; 2 Roper on Husband and Wife, 97, 98; Toller on Executors, 225; 2 Story Eq., 608, 509; *Frary et al v. Booth et al.*, 37 Vt., 88; *Stanton v. Hall*, 2 Russel & Mylne, 175; *Tyler v. Lake*, 1b., 183; *Elliot v. Cordell*, 5 Madd. 96.

To exclude the husband's rights requires affirmative words expressing that intention on the part of the testator. At the decease of Patience, the widow of Perez, the oratrix became seized of a freehold estate in two-thirds of the farm. The rents, profits and products of this estate were the absolute property of her husband. *Reeve's Dom. Rel.*, 27; *Clopp v. Stoughton*, 10 Pick., 463; *Shaw, admr., v. Partridge*, 17 Vt., 626; *Bruce and wife v. Thompson*, 26 Vt., 741.

The purchase of Sophronia's third in the name of the oratrix, was the same, in effect, as if made in the name of her husband. *Reeve's Dom. Rel.*, 60; 2 Story Eq., 448.

The right of the oratrix to the oxen and horse, must stand upon the allegation in the bill that they were purchased with "moneys of her own, which she inherited from her father's estate," and the proof, by the cross-examination of Morse, that the moneys came to her husband's possession. *Parks & Co. v. Cushman*, tr., 9 Vt., 320; 26 Vt., 741; 2 Story Eq., 611; *Ward v. Morrill et al.*, 1 D. Chip., 322.

The source of the oratrix's property, in the cows, steers and heifers, does not appear with sufficient distinctness to show that she has any interest in them. Toller on Executors, 226; 2 Story Eq., 625; 2 P. Williams, 82, 83, 341.

No question arises now as to the equitable right of the oratrix to have any portion of this

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property secured to her and her children's maintenance.

But if the bill were framed with the proper aspect, there is not enough alleged or proved to entitle her to any allowance for maintenance. 24 Vt., 391; Reeve's Dom. Rel., 12 n. 1; *Davis v. Newton*, 6 Met., 587; 24 Vt., 395; 87 Vt. 91; 2 Story Eq., 648; 1 Roper, 171; *Elliot v. Cordell*, 5 Madd., 96.

H. E. Stoughton, for the orators, cited, as decisive of the claims of the defendant *Peck*, *Russell v. Filmore*, 15 Vt., 130; *Blaisdell v. Stevens*, et al., 16 Vt., 179; *Richardson, admr., v. Merrill et al.*, 32 Vt., 28; 19 Vt., 410; *White v. Hildreth and tr.*, 32 Vt., 266; *Webster v. Hildreth and tr.*, 32 Vt., 457; *Caldwell, admr., v. Renfrew*, 33 Vt., 213; *Barron v. Barron et al.*, 24 Vt., 375, 391-397; 32 Vt., 34.

The opinion of the court was delivered by

PIERPOINT, C.J.—It appears in this case, that Tully A. Clark, one of the defendants, is the husband of Louisa Clark, the oratrix, and the son of Perez Clark, deceased. Fessenden Clark, one of the orators, is the administrator, with the will annexed, of said Perez Clark. Shubael Peck, the other defendant, is a judgment creditor of said Tully A. Clark, seeking to collect his execution by the sale of certain property which he has taken thereon, claiming it to be the property of said Tully A. The orators claim that said property belongs to the oratrix, Louisa Clark, being the property, or the product of property that was bequeathed by said Perez Clark to her for her separate use. This bill is brought to restrain the defendants from disposing of said property, and for its return.

The main question involved is as to the construction of that clause in the will of said Perez Clark, by which the bequest is made to said Louisa Clark.

The testator in his will provides for the payment of his debts and the support of his widow, and gives a specific legacy to his son Fessenden, and then says: "I also give to my daughter Sophronia Clark, one third of the residue of all my estate, both real and personal. I also give the use of the other two-thirds of my estate, both real and personal, to Louisa Clark, the wife of my son Tully A. Clark, so long as she shall remain his wife or widow, and when she shall cease to remain his wife or widow, to the lawful heirs of the said Tully A. Clark." Does Louisa Clarke take the property thus bequeathed to her, to her separate use, or subject to the marital rights of her husband? The rule, as laid down by Judge Story, and supported by numerous decided cases, is this: "That where, from the terms of a gift, settlement or bequest, the property is expressly, or by just implication designed to be for her separate and exclusive use (for technical words are not necessary), the intention will be fully acted upon, and the rights and interests of the wife sedulously protected in equity;" but that the purpose must clearly appear beyond any reasonable doubt. 3 Story's Eq., 608.

In ascertaining the intention of the testator (for that is always to be sought for in construing instruments of this kind), we are to be governed by the same rules, in a case like the present, as

apply in all other cases of the construction of wills. We are not to look at the words alone to ascertain the intent, but the language used is to be considered, in connection with the situation of the parties, the surrounding circumstances, the subject matter, the object to be accomplished, etc.; as it is proper to do in the construction of all written instruments. This is too well settled to require argument or authority in its support. In applying this principle to the case in hand, what aid do we derive from such sources? The interest given by the will to Louisa Clarke, is only the use of certain property for a specified period, and then the property itself is given to the children of her husband. She is not the child of the testator; her husband is. They had children, and they and their children were living together in harmony at the time the will was made. There is nothing to show any ill will on the part of the testator toward either. The natural course under such circumstances would seem to have been for the testator to give the property to his son, Tully A., either absolutely, or for his life or the life of his wife, and then to his children. In deviating from this course and in giving the use to his wife, it is apparent the testator had a purpose; and it is difficult to conceive of any other purpose than that she should hold the property to her sole and separate use, to the exclusion of the marital rights of the husband. If the testator had supposed that, in giving this use to the wife, the legal effect would be to vest such use absolutely in the husband, would he have made such a provision? If so why not give it directly to the husband? The legal effect is the same. Why go through the form of apparently giving her something, when in fact he gives her nothing?

If the title to the property had been given to the wife, then there would have been something for the will to operate upon aside from its use; the title would have been in her, subject to the rights of the husband in its use, and we could reasonably suppose such to have been the intent of the testator. But here the use only is given, and that necessarily excludes the use of the husband. To have added to be held to her use would have been mere repetition. If we hold that she takes it subject to the marital rights of her husband, we render the provision wholly nugatory, so far as the interests of the wife are concerned, and make it impossible for her to avail herself of it in any form, and, also, defeat the manifest intent and purpose of the testator in making it.

We think the fair and just implication arising from the language of the provision, viewed in the light of the facts and circumstances always proper to be considered in such cases, is that it was the clear intention of the testator to give the use of the property for the sole and exclusive benefit and use of the said Louisa; and this, too, beyond a reasonable doubt.

If there was occasion for it, I think something might be said as to the reasonableness of the rule requiring that the rights of the wife should be established beyond a reasonable doubt, as against the claims of the husband. Why she is not entitled to the benefit of a fair balance of testimony as in other civil cases, is not quite apparent to me. I am aware of the old idea that the male is the superior branch of the hu-

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## CLARKE V. PECK—DIGEST OF ENGLISH LAW REPORTS.

man family, and that the rule referred to has its origin in that idea, and that all doubts are to be solved, and all presumptions raised in favor of the husband and against the wife, so far as her property is concerned

This idea, and the rules that sprung from it, had their origin in a period much nearer the days of semi-barbarism than the present; and as civilization and Christianity have advanced in the world, the public mind, as evidenced by both legislative and judicial action, has become much more inclined to place the rights of the wife more nearly upon an equality with those of the husband, in respect to property. The court of chancery in this State is constantly extending its action in aid of the rights of the wife to her separate property.

It appears from the bill, answers and proofs, that after the decease of the widow of the testator, to whom he gave all his property during her life, the said Louisa, with the consent of the administrator, as aforesaid, went into possession of the said two-thirds with her said husband and children, and still continues to occupy the same, claiming to have the sole and exclusive right to the use of the same, her said husband acquiescing therein; that she bargained with the said Sophronia for the purchase of the other third of the real estate of the said Perez, took a bond for a deed, and paid a part of the purchase-money out of her own money, being the proceeds of her two thirds of the said estate, and took the possession; that the said Louisa and her husband both treated and regarded the use and product of this property as the separate estate of the said Louisa, the said Tully A. disposing of the product only with her consent and under her direction, and applying the proceeds in the support of herself and family, and, by her directions, in payments toward the share of the said Sophronia.

The right to the use of this property being in the said Louisa, and she being in the possession and occupation thereof, she is clearly entitled in equity to the products thereof, and to be protected against any attempt on the part of the creditors of her husband to deprive her of it. Her title under the will was a matter of record. She was in possession, and that was at least constructive notice to all the world of her right.

The property taken by the said Peck consisted of hay and grain in the straw, which grew upon the said premises, and were on it when taken; a yoke of oxen and a horse, which the said Louisa purchased with her own money, obtained independently of her husband, and which were in her possession on the farm; a wagon and harness, which belonged to the estate of the said Perez, the use of which passed to the said Louisa, and were in her possession; two steers, two cows and two heifers, which were grown and raised upon the said premises, and were a part of the proceeds, product or income thereof.

There is nothing in the case to show that the said Tully A. ever owned any part of this property, or ever paid a dollar toward its purchase or procurement, or ever claimed to own it, or ever exercised any acts of ownership over it except as subservient to her rights as its owner.

Under such circumstances we think it inequitable that the creditors of the said Tully A. should

come in and seize that property, and dispose of it in payment of his debts; and the said orators having come into a court of chancery, and asked to be relieved from the attempt of the defendant to do so, we think they are entitled to the relief prayed for.

*Decree of the Chancellor affirmed.*

## DIGEST.

## DIGEST OF ENGLISH LAW REPORTS.

(Continued from page 247.)

FOR NOVEMBER AND DECEMBER, 1868, AND JANUARY, FEBRUARY, MARCH, AND APRIL, 1869.

EASEMENT—See LANDLORD AND TENANT, 4, 5; LIGHT.

EJECTMENT—See LANDLORD AND TENANT, 8; MESNE PROFITS.

## ELECTION.

1. A., a married woman, having a general power of appointment, notwithstanding coverture over fund X., and also power to appoint fund Y. (in case she died in her husband's lifetime), appointed both funds by will made in her husband's lifetime, amongst several persons, some of whom were her next of kin. By the death of her husband in her lifetime, A. became absolutely entitled to fund Y.; but her will was not republished. Fund X. was insufficient to pay the legacies in full. *Held*, that those of the legatees who were also next of kin were not put to their election, but were entitled both to their shares of the residue (as to which, in the events that had happened, the appointment had failed), and also to proportionate parts of their legacies.—*Blaklock v. Grindle*, Law Rep. 7 Eq. 215.

2. A testator, being entitled under a settlement, subject to a life-interest, to a moiety of a fund, by will, after reciting (erroneously) that he was entitled, "subject to the trusts" in the settlement, to the whole fund, purported to bequeath the whole, and to give one moiety to the husband of the woman who was really entitled to a moiety of the fund. *Held*, that the husband, who had become his wife's administrator, was not bound to elect between the legacy and his wife's moiety.—*Griswell v. Swinhoe*, Law Rep. 7 Eq. 291.

## See VOTER.

## EMBEZZLEMENT.

A. was treasurer of a friendly society, whose rules directed that all money should be paid to the treasurer, and that he should make no payments, except on an order signed by the

## DIGEST OF ENGLISH LAW REPORTS.

secretary, and that he should give security. Another rule provided that all the moneys of the society should be vested in the trustees. A. was a member of the society, but received no salary as treasurer. *Held*, on an indictment against A., as clerk and servant of the trustees of the society, for embezzling money which he had received as treasurer, that he was not the "clerk or servant" of the trustees within 24 & 25 Vict. c. 96, s. 68.—*The Queen v. Tyree*, Law Rep. 1 C. C. 177.

EQUITABLE ASSIGNMENT—*See* ASSIGNMENT.

EQUITY PLEADING AND PRACTICE.

Plaintiff filed a bill alleging that, while in firm, she made a deed in favor of the defendant of which she had no copy, and which the defendant refused to produce, and praying that it might be cancelled. She then filed a second bill, stating the above facts, and alleging that she had since seen the deed; and, finding that it contained a power of appointment, she had made an appointment to herself that the defendant claimed to hold the deed as trustee, and praying that if the court, on the hearing of the first suit, should not be of opinion that the deed ought to be declared void, it would then order that it should be delivered up to her, and that the second suit might be treated as supplemental "so far as necessary or proper" to the first. The defendant demurred to the second bill on the grounds that, (1) the plaintiff should have amended her first bill instead of filing the second; (2) that the bill presented an alternative case. The demurrer was overruled.—*Foulkes v. Davies*, Law Rep. 7 Eq. 42.

*See* ATTORNEY, 8; COMPANY, 8; CONTEMPT, 8; COSTS; INJUNCTION; LUNATIC; PRINCIPAL AND SURETY, 1; VENDOR AND PURCHASER OF REAL ESTATE, 8.

## ESCAPE.

By statute, a registrar in bankruptcy may act, in a commissioner's absence, as commissioner; but the general rules issued under authority of the statute provide that he shall not so act, unless by a request in writing, except in case of emergency, the nature whereof shall be entered on the proceedings. To an action for escape, the sheriff pleaded that the debtor had been released by order of a registrar. The plaintiff replied that the registrar had not been requested in writing to act as commissioner, nor had any emergency arisen, nor the nature thereof been entered on the proceedings. *Held*, on demurrer, that, if the order was voidable, it was not void, and pro-

tested the sheriff.—*Hargreaves v. Armitage*, Law Rep. 4 Q. B. 143.

ESTATE BY IMPLICATION—*See* DEVISE, 8.

ESTATE TAIL—*See* DEVISE, 8; VESTED INTEREST, 2.

## ESTOPPEL.

The plaintiff sold shares in a company to W., the managing director of the company. On the settling day, W. gave the name of G. as the real purchaser, and the transfers were made and sent to him. W. also passed a check on the company's bankers for the amount of the purchase-money to the debit of G. and informed G. what he had done. G. refused to execute the transfers; but retained them till the company was wound up, and then handed them to the secretary as a security for the money carried to his debit. *Held*, that G. was estopped to deny that he was the purchaser of the shares, and that he must indemnify the plaintiff against the calls, and pay the costs of the plaintiff, and of W.—*Shepherd v. Gillespie*, Law Rep. 8 Ch. 764.

*See* COMPANY, 1; DIVORCE, 4; LANDLORD AND TENANT, 8; VENDOR AND PURCHASER OF REAL ESTATE, 8.

## EVIDENCE.

A memorandum by the registrar in bankruptcy on a composition deed, that the deed has been duly registered, pursuant to the provisions of the Bankruptcy Act, 1861, is *prima facie* evidence that an affidavit, pursuant to that act, was delivered to the registrar, together with the deed.—*Waddington v. Roberts*, Law Rep. 8 Q. B. 579.

*See* AWARD, 1, 2; DIVORCE, 1, 8, 4; INSURANCE, 8; INTERROGATORIES; MESNE PROFITS, 1; NECESSARIES; PERPETUITY; PRESCRIPTION; PRESUMPTION; PRODUCTION OF DOCUMENTS; RAILWAY, 2; WILL, 2, 8.

## EXECUTOR AND ADMINISTRATOR.

1. A will contained these words: "I leave the sum of one sovereign each to the executor and witness of my will for their trouble, to see that every thing is justly divided," but did not name any executor. Beneath the signature of the testator, and opposite the names of the attesting witnesses, were the words, "executors and witnesses." *Held*, that there was no appointment of executors.—*Goods of Woods*, Law Rep. 1 P. & D. 566.

2. A. having deposited certain title deeds with a bank as security for advances, by will empowered his executors to charge his real estates in aid of his personal estate. His widow and sole executrix was allowed to draw

## DIGEST OF ENGLISH LAW REPORTS.

out other money as executrix on deposit of other title deeds of A.'s estate. The moneys were drawn out from time to time in small sums, and applied by the widow for her own expenses, as well as for A.'s debts. *Held*, that in absence of proof of notice to the bank of A.'s breach of trust, the bank was entitled to prove against the estate for their advances to the widow.—*Farhall v. Farhall*, Law Rep. 7 Eq. 286.

See CONFLICT OF LAWS; NULLITY OF MARRIAGE; POWER, 2; PRINCIPAL AND SURETY, 1; SALE, 5.

## EXECUTORY TRUST.

A testator gave jewels to A. "to be held as heirlooms by him, and by his eldest son on his death, and to descend to the eldest son of such eldest son, and so on to the eldest son of his descendants, as far as the rules of law or equity will permit. And I request A. to do all in his power, by will or otherwise, to give effect to this my wish." The testator left no real estate. *Held*, that this was a good executory trust for A. for life, remainder to B. (A.'s eldest son) for his life, and on the death of B., in trust for B.'s eldest son, to be a vested interest in him when he should attain twenty-one; but if he should die in B.'s lifetime, or after him under twenty-one, leaving an eldest son born before B.'s death, in trust for such eldest son, to be a vested interest, when he should attain twenty-one. Subject to these limitations, the jewels vested in A. absolutely.—*Shelley v. Shelley*, Law Rep. 6 Eq. 540.

## FACTOR.

An agent "intrusted with, and in possession of, goods," within the Factors Acts, is a person who is intrusted as agent for sale; and, consequently, one whose authority to sell has been revoked cannot pledge goods which had been intrusted to him for sale; but which he has wrongfully retained after his authority has been revoked, and the goods demanded from him by his principal. (Exch. Ch.)—*Fuentes v. Montis*, Law Rep. 4 C. P. 93.

See MARSHALLING OF ASSETS.

FALSE PRETENCES—See LARCENY, 1.

FIXTURES—See LANDLORD AND TENANT, 6.

FORGERY—See LARCENY, 1.

## FRAUDULENT CONVEYANCE.

A trader, by a post-nuptial settlement, settled all his property, both present and future, on trust for his wife for her separate use for life, remainder for himself for life, remainder for his children, reserving the control of his

stock in trade to himself. He had no debts at the time, except mortgages on the settled property, which were afterwards paid off. Five years later he became bankrupt. *Held*, at the suit of his assignees, that the settlement was void, under 13 Eliz. c. 5.—*Ware v. Gardner*, Law Rep. 7 Eq. 317.

See VOLUNTARY CONVEYANCE.

FRAUDS, STATUTE OF—See CONTRACT.

## FREIGHT.

1. The owners of the cargo advanced money to the master, and the master gave a receipt promising to pay the amount out of the freight. *Held*, that this was a loan, and not an advance of freight.—*The Karnak*, Law Rep. 2 Adm. & Eco. 289.

2. The consignee of goods, before the arrival, indorsed the bill of lading to A. in these words: "Deliver to A., or order, looking to him for freight without recourse to us." The goods were delivered to A. In a suit by the ship-owners against the consignee for freight, it was admitted that the consignee would have been liable to A. for any freight paid by him. *Held*, that the burden of proof was on the consignee to show not only that the indorsement was on the bill of lading, when it was given to the captain, but that the captain in fact saw and assented to it. (Exch. Ch.)—*Lewis v. McKee*, Law Rep. 4 Ex. 68.

3. By a charter-party the charterer agreed to load "a full and complete cargo of oats or other lawful merchandise, and to pay freight, as follows:" 4s. 6d. sterling per 320 lbs. weight delivered for oats, and if any other cargo be shipped, in full and fair proportion thereto, according to the Baltic printed rates. The charterer put on board a full and complete cargo of flax, an article mentioned in the said rates, and paid the freight earned by the flax according to a scale derived from the tables which form the said rates. The ship-owners claimed, in addition, the difference between this amount and the amount which would have been earned by a full cargo of oats. *Held*, that flax being "lawful merchandise" within the meaning of the charter-party, the charterer had fulfilled his contract, and was therefore not liable for the additional freight claimed.—*Southampton Steam Colliery Co. v. Clarke*, Law Rep. 4 Ex. 73.

4. The defendant shipped cement under a bill of lading which stipulated that freight should be paid "within three days after arrival of ship, and before delivery of any portion of the goods." The ship arrived with the

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cement, but was, within the three days, in consequence of an accidental fire, scuttled with a view of saving ship and cargo, and on her being raised the cement was found to be useless, having ceased to exist as cement, and the consignees refused to receive it or to pay freight. *Held*, that the ship-owners, not being ready to perform their part of the contract, could not sue for freight.—*Duthie v. Hilton*, Law Rep. 4 C. P. 138.

## FRIENDLY SOCIETY.

A member of a benefit building society obtained an advance on his share on executing a mortgage by which he covenanted to repay the advance with interest by monthly subscriptions. The mortgage contained a power of sale in the event of the subscriptions falling into arrear, and the purchase-money was to be applied in satisfaction of all moneys then due or to become due from the mortgagor in respect of subscriptions, fines, or otherwise, under the mortgage, the surplus to be paid to the mortgagor. The mortgagor having fallen into arrears, the premises were sold. *Held*, (reversing the decision of GIFFARD, V.C.), that the mortgagor was not entitled to any discount on subscriptions not due, though the rules would have allowed him such discount in case of redeeming his mortgage before the expiration of the full period of payment.—*Matterson v. Elderfield*, Law Rep. 4 Ch. 207.

GAS—See INJUNCTION, 1, 2; LARCENY, 3.

GENERAL AVERAGE—See INSURANCE, 2.

## GIFT.

A check was given by A. to B., and presented without delay. The bankers had sufficient assets of A., but refused payment because they doubted the signature. The next day A. died, the check not having been paid. *Held*, a complete gift, *inter vivos*, of the amount of the check.—*Bromley v. Brunton*, Law Rep. 6 Eq. 275.

## GUARANTY.

A. drew bills on B., who accepted them, and C. gave B. a guaranty that funds should be supplied to take them up. S. discounted the bills, being informed by A. of the guaranty; but S. never notified B. or C. *Held*, that S. had no equity to claim as a creditor against C. on the guaranty.—*In re Barnard's Banking Co.*, Law Rep. 3 Ch. 753.

See SALE, 5.

HIRELOOMS—See EXECUTORY TRUST.

HIGHWAY—See INJUNCTION, 1, 2; NEGLIGENCE, 1.  
HUSBAND AND WIFE.

1. Land was held by a trustee on trust to sell

and immediately divide the proceeds among certain persons, one of whom was a married woman. By a deed, in which the *cestuis que trust* joined, the trustee bought the estate. A. and her husband concurred in the deed, but it was not acknowledged under 3 & 4 Wm. IV. c. 74. A.'s husband received her share of the purchase-money. *Held*, that A., who had survived her husband, could have the deed set aside.—*Franks v. Bollans*, Law Rep. 3 Ch. 717.

2. In a settlement made on the marriage of a female infant, the husband covenanted that if his wife attained twenty-one, he would concur and would endeavour to induce her to concur in settling her real estate. This was never done. In 1862, after the wife was of age, the husband and wife mortgaged her real estate to secure money advanced to the husband. They both told the mortgagee that there was no settlement; and though the person who acted as solicitor for both parties knew that there was, he concealed it with the acquiescence of the husband and wife from the mortgagee. In 1865, the mortgagee discovered the existence of the settlement. The mortgage deed, by mistake, was not effectually acknowledged by the wife till after the mortgagee had received notice of the settlement. *Held*, on a bill by the mortgagee, (1) that he was not affected by notice to the solicitor; and (2) that though the wife's estate did not pass to the mortgagee till after notice of the settlement, yet that she had been guilty of a fraud which bound her estate, and that the mortgagee had priority over those claiming under the settlement.—*Sharpe v. Foy*, Law Rep. 4 Ch. 85.

3. In a marriage settlement it was declared and the husband covenanted that if during the coverture any real or personal estate should come to or vest in the wife or the husband in her right, by devise, descent, gift, or otherwise, it should be conveyed and assigned by the husband and wife on the trusts of the settlement. *Held*, that a legacy given to the separate use of the wife was within the covenant.—*Campbell v. Bainbridge*, Law Rep. 6 Eq. 269.

4. A power in a will for trustees to apply part of a fund settled for the separate use of a married woman for life, remainder for her children, at any period of her life for her advancement or benefit: *Held*, under special circumstances to authorize an advance to her husband, on his personal security, for the purpose of setting him up in trade.—*In re Kershaw's Trusts*, Law Rep. 6 Eq. 322.



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See ALIMONY; CONTEMPT, 3; DIVORCE; ELECTION, 1; INJUNCTION, 5; NULLITY OF MARRIAGE; POWER, 2; TRUST, 3; WIFE'S EQUITY.

IGNORANCE OF LAW—See VOTER.

## ILLEGITIMATE CHILDREN.

1. Testator, after a gift to "my son T." (who was illegitimate), directed a division of his estate into seven parts, one of which he gave to his wife and after her death to "such of my children to whom the other six shares are given." He directed those six shares to be paid "among all my children living at my decease, except my son T." Testator left seven children, of whom two (T. and A) were illegitimate. *Held*, that A. was not entitled to a share.—*In re Well's Estate*, Law Rep. 6 Eq 599.

2. An unmarried woman, by will, describing herself as a spinster, gave her property to her children. She had four illegitimate children, and in a codicil she described them by name. *Held*, that these children and not the next of kin were entitled to the property.—*Clifton v. Goodbun*, Law Rep. 6 Eq. 278.

3. Testator gave a fund to his daughter M. for life, and after her death to all the children of M. begotten, or to be begotten, in equal shares. At the time of the testator's death M. had four children by A., whom the testator believed to be M's lawful husband, and after the testator's death M. had three more children by A. The marriage between M. and A. turned out not to be lawful. M. never had any legitimate children. *Held*, that the children born before the testator's death took under the gift, but those born after his death did not.—*Holt v. Sindry*, Law Rep. 7 Eq. 170.

4. Illegitimate children of an unmarried woman described in the will by her maiden name, are entitled to share in a legacy to her "and her two youngest daughters."—*Savage v. Robertson*, Law Rep. 7 Eq. 176.

## INCOME TAX.

A fund was assigned to trustees on trust to pay a fixed sum annually to the assignor's creditors in payment of their debts *pro rata*, with interest on such debts till payment. *Held*, that the assignor was entitled to deduct income tax on the payment of interest.—*Crane v. Kilpin*, Law Rep. 6 Eq. 834.

## INDICTMENT.

1. It is not error that the caption of an indictment states that the grand jurors were sworn and affirmed without alleging who were sworn and who were affirmed.—*Mulcahy v. The Queen*, Law Rep. 8 H. L. 306.

2. The 11 Vict. c. 12, declares it felony "to compass, imagine, invent, devise, and intend to deprive and depose our Lady the Queen." In an indictment under this statute it is sufficient to allege as overt acts that the defendants conspired, combined, confederated, and agreed to commit the offence; and the allegation in one count of several different overt acts of felony is not objectionable.—*Id.*

See JUDGMENT.

## INFANT.

The defendant, being of age, signed the following statement at the foot of an account of the items and prices of goods furnished to him, while an infant by the plaintiff: "Particulars of account to the end of 1867, amounting to 162l. 11s. 6d., I certify to be correct and satisfactory." *Held*, that this was not such a ratification in writing of the contract within 9 Geo. IV. c. 14, s. 5, as to render him liable.—*Rowe v. Hopwood*, Law Rep. 4 Q. B. 1.

See NECESSARIES.

## INJUNCTION.

1. The breaking up of the streets of a town for the purpose of laying gas-pipes without lawful authority will be enjoined in equity. (*Sheffield Gas Consumers' Co.*, 3 DeG. M. & G. 304, not followed.)—*Attorney-General v. Cambridge Consumers' Gas Co.*, Law Rep. 6 Eq. 282.

2. The breaking up of the streets of a town without lawful authority, for the purpose of laying pipes by an unincorporated gas company, is not such a nuisance as will be enjoined in equity on an information at the relation of a rival gas company (reversing the decree of MALINS, V.C.)—*Attorney-General v. Cambridge Consumers' Gas Co.*, Law Rep. 4 Ch. 71.

3. Where a plaintiff has proved his right to an injunction against a nuisance, it is not for the court to inquire how the defendant can best remove it. The plaintiff is entitled to an injunction at once unless the removal of the nuisance is physically impossible. But when the difficulty of removing the injury is great, the court will suspend the operation of the injunction for a time, with liberty to the defendant to apply for an extension of time.—*Attorney-General v. Colney Hatch Lunatic Asylum*, Law Rep. 4 Ch. 146.

4. The defendants, officers of a trades' union gave notice to workmen by placards not to hire themselves to the plaintiff pending a dispute between the defendants and the plaintiff. The bill prayed an injunction to restrain the issuing of the placards, alleging that by means thereof the defendants had intimidated work-

## DIGEST OF ENGLISH LAW REPORTS.

men from hiring themselves to the plaintiff, and that the plaintiff was thereby prevented from continuing his business, and the value of his property materially diminished. *Held*, on demurrer, that the acts, as alleged, amounted to crime, and that they would be enjoined, inasmuch as they also tended to the deterioration of property.—*Springhead Spinning Co., v. Riley*, Law Rep. 6 Eq. 551.

5. A wife moved for an injunction to restrain her husband from proceeding to obtain a dissolution of marriage, alleging a contract by him to condone all former causes of complaint, and not to take legal proceedings in respect thereof. The injunction was refused, as the contract might be set up in defence in the divorce court, and as it was executed by the husband in ignorance of the fact that his wife had committed adultery and on her positive assertion of innocence.—*Brown v. Brown*, Law Rep. 7 Eq. 185.

6. An injunction restraining a defendant from entering a house was suspended during an appeal to the House of Lords; the case being one in which irreparable injury might be done to the defendant, and the defendant undertaking to proceed on the appeal with all due diligence.—*Walford v. Walford*, Law Rep. 3 Ch. 812.

See CONTEMPT, 8; Costs.

INSANITY—See LUNATIO.

## INSURANCE.

1. A policy with the usual suing and laboring clause on the plaintiff's vessel was made "subject to the running down clause." By that clause, the assurers agreed that if the plaintiff became liable to pay and paid as damages for running down any other ship any sum not exceeding the value of the vessel insured, they would repay to the plaintiff a certain proportion of such sum. The vessel having run down another, the plaintiff successfully defended an action brought against him for the injury. *Held*, that he could not recover any part of the costs of the defence, either under the suing and laboring clause, or the running down clause.—*Xenos v. Fox*, Law Rep. 3 C. P. 680.

2. A. insured goods by a policy which included jettison among the perils insured against. The goods were jettisoned. A. sued the underwriters for the whole amount insured, without having first collected the contributions to which he was entitled from the other owners of the ship and cargo. *Held*, that he could recover.—*Dickenson v. Jardine*, Law Rep. 3 C. P. 639.

3. A. insured goods against "perils of the seas," &c., and "all other perils, losses," &c., for a voyage by a steamer from K. to Y. While the steamer was loading at K., her draught was increased by the weight of the cargo, till the discharge pipe was brought below the water, which then flowed in and through some valves negligently left open, and injured A.'s goods. *Held*, (1) that the injury was caused by a peril insured against; (2) that the burden of proving unseaworthiness was on the underwriter.—*Davidson v. Burnand*, Law Rep. 4 C. P. 117.

## INTEREST.

1. In the voluntary winding up of a joint-stock company, claim made to the liquidator on bank-notes and drafts current at the time of the stoppage, is a sufficient demand for payment, and interest runs from the date of such claim.—*In re East of England Banking Co.*, Law Rep. 4 Ch. 14.

2. Upon the winding up of a bank, all the debts of which were paid in full, interest was claimed on bank-notes and drafts current when the bank stopped payment. *Held*, that closing the doors of the bank dispensed with the necessity of a formal demand, and that interest was therefore payable.—*In re East of England Banking Co.*, Law Rep. 6 Eq. 368.

3. The plaintiff was liable to pay a debt which carried interest at 11 per cent. The defendant was so bound to indemnify the plaintiff, but the plaintiff knew that the defendant denied that he was so bound, and would not pay without suit. *Held*, that the plaintiff ought to have paid the debt at once, and could only recover interest at 4 per cent from the time the debt was due.—*Hawkins v. Maliby*, Law Rep. 6 Eq. 505.

See BOND; PRINCIPAL AND SURETY, 2; TENANT FOR LIFE AND REMAINDER MAN.

## INTERROGATORIES.

1. In an action for libel, leave to put interrogatories to the defendant was refused, the avowed object of the plaintiff being to make the defendant criminate himself if he answered them in the affirmative.—*Edmunds v. Greenwood*, Law Rep. 4 C. P. 70.

2. It is no objection to the administration of interrogatories tendered to the defendant in a cause of possession in the admiralty, that his answers might subject him to penalties under the Foreign Enlistment Act; but if he states on oath his belief that an answer to any particular interrogatory will subject him to such penalties, he will not be compelled to

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answer it.—*The Mary or Alexandra*, Law Rep. 2 Adm. & Ecc. 819.

JOINT TENANCY—See NEXT OF KIN, 2; TENANCY IN COMMON.

## JUDGMENT.

*Semble*, that when judgment is given on a verdict of guilty on a count in which several overt acts are charged, the judgment will be sustained, if any one of the overt acts be sufficient and be sufficiently alleged.—*Mulcahy v. The Queen*, Law Rep. 3 H. L. 806.

## JURISDICTION.

County courts have jurisdiction of actions of ejectment where the yearly value of the premises does not exceed 20*l*. A county court decided on conflicting evidence that the yearly value of the premises did not exceed 20*l*. *Held* (*per* COCKBURN, C.J., and LUSH, J.; HANNEN, J., *dubitante*), that the Court of Queen's Bench could not review this decision by prohibition.—*Brown v. Cocking*, Law Rep. 8 Q. B. 612.

See ADMIRALTY; AWARD; ESCAPE; INJUNCTION, 4; TRUST; VENDOR AND PURCHASER OF REAL ESTATE, 8.

## JURY.

The 8 & 4 Wm. IV. c. 91, provides that the sheriff shall not return as jurors the names of any persons not qualified to serve according to the act, "and that every man except as hereinafter excepted, between the ages of twenty-one years and sixty years, residing, &c., shall be qualified with respect to property, and shall be liable to serve on juries." *Held*, that when a jurymen was returned whose age exceeded sixty years, that fact only operated in his favor as an exemption, and was not cause for challenge by the prisoner.—*Mulcahy v. The Queen*, Law Rep. 3 H. L. 806.

## LANDLORD AND TENANT.

1. B. executed a mortgage of certain premises to the defendants. The mortgage was by indenture, but was never executed by the defendants; by it B. conveyed the premises in fee, on trust for sale, "and as a further security for the principal and interest for the time being due from B. to the defendants." B., by the deed, attorned, and became tenant to the defendants for and during the term of ten years, if that security should so long continue, at a certain yearly rent, payable on each 1st of October. "Provided, that without any notice or demand it should be lawful for the defendants, before or after the execution of the trusts of sale, to enter on the premises, eject B., and determine the said term of ten years." B. accordingly continued in occupation, and rent not being paid on the first rent

day, the defendants distrained. *Held*, that the intention of the parties, as appeared by the deed, was to create a tenancy at will only; that a deed being therefore unnecessary, the tenancy was created by the assent of the parties and the occupation under it, and that the fact that the defendants had not executed the deed was immaterial.—*Morton v. Woods*, Law Rep. 3 Q. B. 658.

2. A let to B. a defined portion of a room in a factory, with steam-power for working machines belonging to B, at a certain yearly sum, payable quarterly; a deduction to be allowed in case of hindrances in the supply of power. *Held*, a sufficient demise to entitle A. to distrain.—*Selby v. Greaves*, Law Rep. 3 C. P. 594.

3. A tenant is estopped to deny that his landlord has a legal reversion, though it appear from the instrument of demise that the landlord has only an equity of redemption.—*Morton v. Woods*, Law Rep. 3 Q. B. 658.

4. The lessee of an inner close has, by necessity, a right of way over an outer close which belongs to his lessor, but he cannot, by user, acquire an easement to deposit packages on a close which belongs to his lessor.—*Gayford v. Moffatt*, Law Rep. 4 Ch. 183.

5. The plaintiff took a lease for ninety-nine years, with a covenant for quiet enjoyment, of land on which his lessor had built him a house. The plaintiff laid out a garden on the demised land back of the house. Subsequently, the plaintiff's lessor let the adjoining land to the defendant, who built thereon a stable, having a wall twenty-three feet high, running the whole length of the plaintiff's garden. The plaintiff filed a bill to restrain the erection of the wall as interfering with the free access of light and air to, and the enjoyment of, his garden. *Held*, that there was no contract, express or implied, that the enjoyment of the garden, as garden, should not be interfered with.—*Potts v. Smith*, Law Rep. 6 Eq. 311.

6. A lessee covenanted, for himself and his assigns, that he and they would not assign the demised premises without the consent of the lessor. *Held*, that this covenant ran with the land, and that the lessor could sue an assignee of the lease for the breach of it, and that the measure of damages would be such a sum as would place the lessor in the same position as if he had still the defendant's liability, instead of the liability of another of inferior pecuniary ability, for breaches both past and future.

Similar covenants to keep the buildings in repair, and to repair and replace tenants

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fixtures fixed to the premises, run with the land, but not similar covenants as to movable chattels on the premises at the time of the demise.—*Williams v. Earle*, Law Rep. 3 Q. B. 739.

7. An underlease of a whole term amounts to an assignment.—*Beardman v. Wilson*, Law Rep. 4 C. P. 57.

8. A tenant under a parol agreement underlet a part of the premises, and at the determination of both tenancies the undertenant held over against the will of the tenant. *Held*, that the landlord could recover against the tenant as damages the value of the premises for the time he was kept out of possession, and the costs of ejecting the undertenant.—*Henderson v. Squire*, Law Rep. 4 Q. B. 170.

*See* CONDITION; COVENANT, 8; MORTGAGE, 2. LARCENY.

1. The cashier of a bank has a general authority to conduct its business, and to part with its property on the presentation of a genuine order; and if, being deceived by a forged order, he parts with the bank's money, he parts, intending so to do, with the property in the money, and the person knowingly presenting the forged order is not guilty of larceny, but of obtaining money on false pretences.—*The Queen v. Prince*, Law Rep. 1 C. C. 150.

2. Partridges, hatched and reared by a common hen, so long as they remain with her, and from their inability to escape, are practically in the power and dominion of her owner, may be the subject of larceny, though the hen is not confined in a coop, but at liberty.—*The Queen v. Shickle*, Law Rep. 1 C. C. 158.

3. A. stole gas for the use of a manufactory by drawing it off from the main through a pipe, which was never closed at its junction with the main. The gas from this pipe was burnt every day, and turned off at night. *Held*, (1) that as the pipe always remained full, there was a continuous taking of the gas, and not a series of separate takings; and (2) that even if the pipe had not been kept full, the taking would have been continuous, as it was substantially one transaction.—*The Queen v. Firth*, Law Rep. 1 C. C. 172.

*LEASE*—*See* LANDLORD AND TENANT; PRESUMPTION.

*LEGACY*.

1. A testator gave a legacy to A., "if not an uncertificated bankrupt at my death." A. was a bankrupt at the testator's death, but the bankruptcy was annulled four months later. *Held*, that A. was not entitled to the

legacy.—*Cox v. Fonblanque*, Law Rep. 6 Eq. 482.

2. A testator gave a legacy to several persons successively for their lives, and after the death of all of them to H.; but if H. should be dead when the legacy should "descend and come" to him, then that the same should be paid to all the children of H., "except the one entitled to any real property on his father's decease." On the death of H., in 1862, after the testator's death, his eldest son became tenant for life in remainder of real estate, expectant on the death without issue of the tenant for life in possession, which happened in 1868. The surviving tenant for life of the legacy died in 1867. *Held*, that the eldest son of H. was excluded from participation.—*In re Grylls's Trusts*, Law Rep. 6 Eq. 589.

*See* BOND; CHARITY; CONVERSION; DEVISE; ELECTION; EXECUTORY TRUST; HUSBAND AND WIFE, 3; ILLEGITIMATE CHILDREN; MORTMAIN; NEXT OF KIN, 1; PERPETUITY; VESTED INTEREST; WILL, 4-7.

*LEGISLATURE*—*See* LIBEL.

*LEX LOCI*—*See* CONFLICT OF LAWS.

*LIBEL*.

An accurate report in a newspaper of a debate in parliament, containing matter disparaging an individual, is not actionable; the publication is privileged on the ground that the advantage of publicity to the community outweighs any private injury; and comments in the newspaper on the debate are so far privileged, that they are not actionable so long as they are honest, fair, and justified by the circumstances disclosed in the debate.—*Wason v. Walter*, Law Rep. 4 Q. B. 73.

*See* INTERROGATORIES, 1; SLANDER.

*LIGHT*.

To acquire a right to the access of light and air to a house by actual enjoyment, under 2 & 3 Wm. IV. c. 71, s. 8, it is not necessary that the house should be occupied or fit for immediate occupation during the statutory period.—*Courtauld v. Legh*, Law Rep. 4 Ex. 126.

*See* LANDLORD AND TENANT, 5.

*LIMITATIONS, STATUTE OF*—*See* TENANCY IN COMMON, 2.

*LORD'S DAY*—*See* SUNDAY.

*LUNATIC*.

1. A lunatic died seised of real estate; it had not been found who was her heir. F., C., and D. respectively claimed as heirs. The person who had been acting as solicitor for the committee, acted as F.'s solicitor, and had induced the tenants to attorn to him. On bills

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filed by C. and D., *held*, that a receiver ought not to be appointed, it being merely a case where several persons set up adverse legal titles.—*Carrow v. Ferrior*, Law Rep. 8 Ch. 719.

2. M. filed a bill as next friend of P., whom he alleged to be of unsound mind. P., on a proceeding in lunacy, was found sane. The bill was taken off the files on P.'s application, and M. ordered to pay P.'s costs, as between solicitor and client, and the defendant's costs as between party and party.—*Palmer v. Walesby*, Law Rep. 8 Ch. 782.

**MARRIAGE**—*See* DIVORCE; NULLITY OF MARRIAGE.

**MARRIED WOMAN**—*See* HUSBAND AND WIFE.

**MARSHALLING OF ASSETS.**

A., in Ceylon, was in the habit of consigning cargoes to his factors in England for sale on his account, and of drawing bills on the factors against the consignments. Consignments of coffee having been thus made, and the factors having accepted bills against them, the factors pledged the coffee, together with certain securities of their own, with one T., to secure a debt due from them to him. The factors became bankrupt, and T. sold the coffee (which produced more than enough to cover the bills drawn against it), and enough of the other securities to satisfy his debt. *Held*, that A. was entitled as against the factors' estate to have the remaining securities in T.'s hands marshalled, and to have a lien thereon for the balance due him on account of the coffee.—*Ex parte Alston*, Law Rep. 4 Ch. 168.

**MASTER**—*See* BOTTOMREY BOND; COLLISION, 8; FREIGHT, 1, 2.

**MASTER AND SERVANT.**

To an action for breach of an indenture of apprenticeship, the defendant, the apprentice's father, pleaded that the apprentice "was and is prevented by act of God, to wit, by permanent illness, happening and arising after the making of the indenture, from remaining with or serving the plaintiff during all said term." *Held*, on demurrer, a good plea in excuse of performance, without any averment that the plaintiff had notice of the illness before the commencement of the action.—*Boast v. Firth*, Law Rep. 4 C. P. 1.

*See* CONTRACT; SEDUCTION.

**MESNE PROFITS.**

1. In an action of trespass for mesne profits the plaintiff proved that the defendant had had a lease of the premises (which was not produced), and that he had paid a certain yearly rent; but when or for how long did not ap-

pear. He also gave in evidence a judgment by default in a previous action of ejectment for the same premises. By the writ in ejectment, which was dated February 6th, 1868, the plaintiff had claimed title from March 28th, 1867. *Held*, that on all this evidence it sufficiently appeared that the defendant was in possession of the premises at the date of the writ of ejectment, and that the plaintiff was entitled to mesne profits from that time.

Per KELLY, C.B. The judgment by default taken alone is no evidence of the defendant's possession at any time. Per CHANNELL and CLEARY, BB., such judgment is *prima facie* evidence that the defendant was in possession at the date of the writ, but not for the period during which the plaintiff claims title in his writ.—*Pearse v. Coaker*, Law Rep. 4 Ex. 92.

2. In an action for mesne profits the declaration alleged that the plaintiff "had incurred great expense in recovering possession of his land." *Held*, that under these words he was entitled to recover the costs of a previous action of ejectment.—*Id.*

**MISREPRESENTATION**—*See* HUSBAND AND WIFE, 2; INJUNCTION, 5; VENDOR AND PURCHASER OF REAL ESTATE, 3.

**MISTAKE**—*See* AWARD, 1; REVOCATION OF WILL.

**MONEY HAD AND RECEIVED.**

Where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, and the holder promises to pay the transferee, an action for money had and received lies at the suit of the transferee against the holder.—*Griffin v. Weatherby*, Law Rep. 8 Q. B. 758.

**MORTGAGE.**

1. A debenture purporting to be an assignment of the undertaking and of all the real and personal estate of a company, to secure the repayment of a sum of money at a future date, creates a valid charge on all personal estate existing at the date of the debenture, but not on subsequently acquired personal estate.—*In re New Clydach Sheet and Bar Iron Co.*, Law Rep. 6 Eq. 514.

2. A mortgaged the lease of the house in which he lived, together with two policies of insurance, to the defendant, to secure the repayment of £250 and interest, and also the premiums. The mortgage deed contained a clause by which the mortgagor attorned tenant from year to year to the mortgagee in respect to the house at the yearly rent of £175. The

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mortgagor having become bankrupt, the mortgagee distrained for a year's rent under the attornment clause, though at that time the landlord's rent of £116, the interest on the money advanced, and the premiums, had all been paid. *Held*, on demurrer, that the attornment clause was not intended to enable the mortgagee to repay himself any of the capital advanced, but only to secure the payment of rent, interest, and premiums.—*Hampson v. Fellows*, Law Rep. 6 Eq. 575.

3. A mortgage deed contained a power to the mortgagee, on default, to sell and dispose of the premises by public sale or private contract for such price as could reasonably be gotten for the same. Default having been made, the mortgagee sold the premises and credited the mortgagor with the whole of the purchase-money; but in fact received only a part, and allowed the remainder to remain on mortgage given by the purchaser. *Held*, that the transaction being *bona fide*, the execution of the power was valid, and the original mortgagor had no equity of redemption.—*Thurlow v. Mackeson*, Law Rep. 4 Q. B. 97.

See DEMAND; DEVISE, 2; EXECUTOR AND ADMINISTRATOR, 2; FRIENDLY SOCIETY; HUSBAND AND WIFE, 2; LANDLORD AND TENANT, 1, 3; PRIORITY.

## MORTMAIN.

A legacy payable out of both personalty and the proceeds of the sale of realty is, while unpaid, within the statute of mortmain; and it cannot be bequeathed by the legatee to a charity, nor can it be apportioned so as to give the charity that part of the legacy which would be paid out of personalty.—*Brook v. Badley*, Law Rep. 3 Ch. 672.

See WILL, 5.

## NAVIGABLE WATER.

A claim for anchorage dues on a navigable arm of the sea cannot be supported in respect of the mere ownership of the soil; but such ownership, together with the maintenance of buoys from time out of mind, and the benefit to the public therefrom, are a sufficient consideration to support the claim, if the dues have been paid time out of mind. (Exch. Ch.)—*Free Fishers of Whitstable v. Foreman*, Law Rep. 8 C. P. 578.

See PRESCRIPTION.

## NECESSARIES.

The plaintiff sold to the defendant, a minor, a pair of jewelled solitaires, which might be used as sleeve-buttons, worth £25, and an antique silver goblet, worth £15, which last the plaintiff knew the defendant intended for

a present. The defendant was the younger son of a deceased baronet, with no establishment of his own, and an allowance of £500 a year. In an action for the price of these articles, the question whether they were necessities was left to the jury, who found that they were. *Held* (Exch. Ch.), that the question whether they were necessities was one of fact, but like other questions of fact should not be left to the jury unless there was evidence on which they could reasonably find that they were; that there was no such evidence in this case, and that a nonsuit ought to have been ordered.

Whether evidence that the defendant was sufficiently provided with such articles, though the plaintiff did not know it, was admissible, *quære*.—*Ryder v. Wombwell*, Law Rep. 4 Ex. 82. NEGLIGENCE.

1. The defendant, under a contract with the Metropolitan Board of Works, opened a public highway for the purpose of constructing a sewer; some months afterwards, the plaintiff's horse was injured by stumbling in a hole in the road. The defendant had properly filled up the road, and the hole was owing to the natural subsidence which sometimes takes place, sooner or later, after such an excavation. *Held*, that the defendant was not liable for the damage, for that there was no obligation on him to do more than properly reinstate the road. (Exch. Ch.)—*Hyams v. Webster*, Law Rep. 4 Q. B. 188.

2. The plaintiff, while travelling by the defendant's railway, was injured by the fall of a girder, which workmen, not under the defendant's control, were employed in placing across the walls of the railway. It was proved that the work was very dangerous, though none of the witnesses had ever known of a girder falling; that it was the practice when such work was going on over a railway, for the company to place a man to signal to the workmen the approach of a train; and that this precaution was not taken; but there was no evidence that the company's servants knew that the girder was being moved at the time the train was passing, or knew the means used for moving it. On a case in which the court were at liberty to draw inferences of fact: *Held* (in the Exchequer Chamber, reversing the judgment of the Court of Common Pleas), that though the evidence of negligence was such that it could not have been withdrawn from a jury, yet, that as a fact, the defendants were not guilty of negligence.—*Daniel v. Metropolitan Railway Co.*, Law Rep. 8 C. P. 691.

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*See* BILL OF LADING; COLLISION, 2, 8; DAMAGES, 1; RAILWAY, 2; SHIP, 2.

NEGOTIABLE INSTRUMENTS—*See* BILLS AND NOTES, NEW TRIAL—*See* SLANDER.

## NEXT OF KIN.

1. A legacy was given on trust for F., a married woman, for life, then to her husband for life, and after the death of the survivor, for such persons "related by blood" to F. as she should appoint, and, in default of appointment, for those who would be "the personal representatives" of F. in case she had died sole and unmarried. A codicil referred to the above trusts as being for the benefit of the "relations and next of kin" of the testator's daughter. F. died during the testator's life. *Held*, that "personal representatives" meant statutory next of kin.—*In re Gryll's Trusts*, Law Rep. 6 Eq. 589.

2. Personal property was settled by a marriage settlement, after other trusts, in trust for such person or persons as at the wife's death should be her next of kin "under and according to" the Statute of Distributions. *Held*, that the next of kin took as tenants in common, and not as joint-tenants.—*In re Ranking's Settlement Trusts*, Law Rep. 6 Eq. 601.

*See* WILL, 6.

NOTICE—*See* COVENANT, 1; EXECUTOR AND ADMINISTRATOR, 2; HUSBAND AND WIFE, 2; MASTER AND SERVANT; PRIORITY.

NOVATION—*See* SALE, 5.

NUISANCE—*See* INJUNCTION, 1-3.

## NULLITY OF MARRIAGE.

Impotence does not render a marriage void, but only voidable, and the validity of a marriage cannot be impeached on that ground after the death of one of the parties. Therefore the right of a husband to administer his wife's estate cannot be disputed on the ground of the nullity of the marriage by reason of his impotence.—*A. v. B.*, Law Rep. 1 P. & D. 559.

OFFICER—*See* ESCAPE; STAMPS.

PARENT AND CHILD—*See* SEDUCTION.

PARLIAMENT—*See* LIBEL.

PAROL EVIDENCE—*See* AWARD, 1, 2; PERPETUITY, 1.

PARTIES—*See* COMPANY, 8; VENDOR AND PURCHASER OF REAL ESTATE, 3.

## PARTNERSHIP.

1. A court of equity will not decree specific performance of a contract for partnership, where the plaintiff has a remedy at law, where there are no legal difficulties in the way, which the court can remove, and where there has been no part performance.—*Scott v. Raymond*, Law Rep. 7 Eq. 112.

2. B. and H. owned a newspaper in equal shares. B. assigned his share to W., who had the assignment registered under the Copyright Act. W. knew at the time of the purchase that there was a suit between B. and H. as to the ownership of the newspaper, and after the purchase he allowed B. and H. to carry on the newspaper as partners. *Held* (1) that W. could only take B.'s share, subject to the equities between the partners; and (2) that the registration was futile, as there was nothing analogous to copyright in the name of a newspaper.—*Kelly v. Hutton*, Law Rep. 8 Ch. 703.

*See* TENANCY IN COMMON, 1.

PENALTY—*See* BOND, 2; BROKER.

## PERPETUITY.

1. Gift by will to a woman for life, remainder to her children for life, and a gift over to the grandchildren. *Held*, that evidence that at the date of the will, the woman was past child-bearing was not admissible to show that children then living were meant, so as to make valid the gift over, which otherwise was void for remoteness.—*In re Sayer's Trusts*, Law Rep. 6 Eq. 819.

2. A testator directed trustees to apply so much as was necessary of the income of his residuary personal estate for the maintenance of A., a lunatic, and to invest any surplus, and treat it as part of the testator's personal estate, which was given over after A.'s death. *Held*, that under the Thelluson Act, the direction to invest the surplus was void beyond the period of twenty-one years, and that the testator's next of kin were entitled to the accumulations.—*Mathews v. Keble*, Law Rep. 8 Ch. 691.

PILOT—*See* COLLISION, 1-3; SHIP, 4.

PLEADING—*See* COLLISION, 5; EQUITY PLEADING AND PRACTICE; INDICTMENT, 2; MASTER AND SERVANT; MISSE PROFITS, 2.

PLEDGE—*See* FACTOR; MARSHALLING OF ASSETS. POWER.

1. A., having power to appoint funds by deed or by her last will in writing or any writing purporting to be or being in the nature of her last will, to be signed in the presence of two witnesses, died intestate, but left in an envelope an unattested memorandum signed by herself "for my son and daughters. Not having made a will, I leave this memorandum, and hope my children will be guided by it, though it is not a legal document. The funds I wish divided" in a certain way. *Held*, that this memorandum showed no intention to execute the power, and that therefore the

## DIGEST OF ENGLISH LAW REPORTS.

court could not give it validity as an appointment.—*Garth v. Townsend*, Law Rep. 7 Eq. 220.

2. By a marriage settlement, a fund was settled on such trusts as the wife should by will appoint, and, in default of appointment, in trust for such persons as should, at the death of the survivor of the husband and wife, be the next of kin of the wife. By her will, purporting to exercise the power, the wife gave all her property to her executors therein named, and gave several legacies which did not exhaust the fund. She died in her husband's lifetime. *Held*, that the fund was by the appointment all converted into the wife's general personal estate, and that the surplus, after paying legacies, belonged to her husband and not to those entitled under the settlement in default of appointment.—*Brickenden v. Williams*, Law Rep. 7 Eq. 810.

3. A. devised his estate to B. for life, without impeachment of waste, and then to B.'s issue, and in default of issue over. The will gave B., or any person in possession under the limitations of the will, power to work or to lease the mines. B. was to pay over to trustees the rents and profits of the mines, and with them B. was to buy, with the consent of the trustees, other estates, of which she was to receive the rents during her life. While in possession, B. made a lease for sixty years. *Held*, that the lease was not warranted by the power, for that on the whole will it appeared that A. intended to restrict B. to making a lease for her life only.—*Vivian v. Jegon*, Law Rep. 8 H. L. 285.

4. A settlement contained, among other things, a power for B., in case of the death of his first wife and his marrying again, to charge the estates with portions for the younger children of his second marriage, the amounts to be greater or less, according to the number of children of the first marriage. The deed provided that if the brothers of B. should respectively, come into possession of the estate, "either before or after their marriage with any woman or women," they might charge the estate with "the like sum or sums of money for the portion or portions of their child or children (other than an eldest son), as B. is entitled to do before or after his marriage with any woman or women after the death of his first wife." *Held* (Lord CRAWFORD, *dubitante*), that this was an absolute power which, with reference to a younger brother of B. succeeding to the estate, was not subject to the restrictions and contingen-

cies which applied to B.—*Earl of Harrington v. Countess (Dowager) of Harrington*, Law Rep. 8 H. L. 295.

*See* CONVERSION; ELECTION, 1; HUSBAND AND WIFE, 4; MORTGAGE, 3.

PRACTICE—*See* COSTS; EQUITY PLEADING AND PRACTICE; INTERROGATORIES.

## PRESCRIPTION.

The owner of a several fishery in a navigable and tidal river claimed a right to use stop-nets to catch fish. The nets had been in use for forty-five years up to 1862; there was no evidence of previous user, nor was there any evidence to the contrary. *Held*, that the user for forty-five years did not raise a conclusive presumption of law that the nets had been used from time immemorial.—*Holford v. George*, Law Rep. 8 Q. B. 689.

*See* LANDLORD AND TENANT, 4; LIGHT; NAVIGABLE WATERS.

## PRESUMPTION.

By an indenture dated 1598, a farm was demised for 1,000 years, with a covenant by the lessor to convey the fee to the lessee within five years if required. The farm was assigned as leasehold in 1777, since which time it had been three times devised as freehold, and on the court rolls of the manor, of which the farm formed part, the land was called freehold. *Held* (reversing the decision of the Master of the Rolls), that the farm remained leasehold as between the heir and administrator of an intestate owner.—*Pickett v. Packham*, Law Rep. 4 Ch. 190.

*See* PRESCRIPTION; WILL, 3.

PRINCIPAL AND AGENT—*See* BILLS AND NOTES, 2; FACTOR; SALE, 1.

## PRINCIPAL AND SURETY.

1. A surety on a bond to secure a debt was secured by another bond of indemnity against all sums he might be called on to pay as such surety. This second bond was given by one A., who had died, having by will devised certain property specifically on trust to pay the debt. The creditor having applied to the surety, the surety had recourse to A.'s executors, who said that they had no funds, and were unable, under the will, to raise money by sale of A.'s estate without a decree of the court. *Held*, that though the surety had paid nothing, yet he could maintain a bill against the executors for administration, payment of the debt, and indemnity; and also that the bill need not be filed on behalf of all the creditors of A.—*Wooldridge v. Norris*, Law Rep. 6 Eq. 410.

2. A third party joined in a mortgage as



## DIGEST OF ENGLISH LAW REPORTS—REVIEWS.

surety, but for the payment of interest only, and the principal and surety covenanted jointly and severally with the creditor to pay the interest. Afterwards the debtor executed a deed whereby he assigned all his property in trust for his creditors, and the creditors released him from all debts, with a proviso that nothing contained in the deed should affect any mortgage held by any creditor, or any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor either alone or jointly with any other person. *Held*, that the deed gave only a qualified release, and did not extinguish the debt, and that the remedy of the creditor against the surety for interest was not barred.—*Green v. Wynn*, Law Rep. 7 Eq. 28; s. c. Law Rep. 4 Ch. 204.

*See GUARANTY.*

## PRIORITY.

1. Where a prior equitable title is established by the court against one who took an equitable mortgage by deposit of the title deeds: *Semble*, the court will order him to deliver up the deeds, though he acquired them for value and without notice from the legal owner.—*Newton v. Newton*, Law Rep. 4 Ch. 148.

2. The owner of a ship mortgaged her to G., who transferred the mortgage to A. Both mortgage and transfer were registered. Subsequently G. paid off A., and an entry discharging the mortgage was made in the registry. After a year A. re-transferred to G. this mortgage, and the registrar wrote in the margin of the register, that a re-transfer only had been intended. G. then transferred the mortgage to W. by way of security, and the transfer was registered. In March, 1865, G. paid off W., but no re-transfer was executed. In May, 1865, the ship-owner gave G. another mortgage, which was registered. In November, 1865, this mortgage was transferred to B., but was not registered till July, 1866. In March, 1866, G. agreed with W. that G.'s original mortgage should be a security for the balance due from G. to W. *Held*, that the first mortgage was discharged by the entry of discharge, and could not be revived, and that the new agreement between G. and W., not being registered, was of no avail against B.—*Bell v. Blyth*, Law Rep. 4 Ch. 186.

*See CONFLICT OF LAWS; HUSBAND AND WIFE, 2; PARTNERSHIP, 2.*

PRIVILEGE—*See ARREST; LIBEL.*

PRODUCTION OF DOCUMENTS—*See ATTORNEY, 3, 4.*

PROHIBITION—*See JURISDICTION.*

PROMISSORY NOTE—*See BILLS AND NOTES, 2, 3; INTEREST, 1, 2.*

PUBLIC OFFICER—*See STAMPS.*

QUIA TIMET—*See PRINCIPAL AND SURETY, 1.*

## REVIEWS.

THE REAL PROPERTY STATUTES OF ONTARIO, WITH REMARKS AND CASES. By Alexander Leith, of Toronto, Barrister-at-Law: Henry Rowsell, King Street, Toronto, 1869.—Vol. I.

If any professional man in good practice in Ontario were asked what new books he would like to see within his easy reach, he would probably say a collection of the Real Property Statutes with notes and cases (if possible from the pen of such a reliable authority as Mr. Leith), a consolidated digest of the Upper Canada reports, bringing the cases down to the present time, and a new edition of Harrison's Common Law Procedure Act.

In all these, we are likely soon to be gratified. Mr. Leith's first volume has been published; the digest is well on its way to completion, and three parts of the Common Law Procedure Act have been printed.

If we remember correctly, Lord Bacon says, in some of his writings, that every man is a debtor to his profession, and if debtors, we should try to pay our debts, not certainly all by writing books—that would be as improbable as it would be appalling—but in such ways as tastes and circumstances may direct. That Mr. Leith has gone far towards paying his debt, we have all reason to testify.

It is eminently proper that those who are specially learned in any particular branch of the laws, should give the public the benefit of their research, labour, or talent. This is particularly the case where, as in this country, from local differences in legislation, the many admirable text books of the old country fail to guide us. We should, therefore, always welcome, and, as far as in us lies, encourage all that appertains to Canadian legal literature. Let it not be imagined that, as a matter of money, law books in Canada "pay;" copying at three cents a folio would earn more money, nor does it even "pay" in the way that writers in England make capital out of their works; all the more credit then, say we, to those who have sufficient courage and

## REVIEWS.

patience to devote their spare time and energies to an attempt, however feeble it may be, to add to the general stock of knowledge, or to save the time and labour of their fellow workers. But we are beginning to wander from the subject in hand.

Mr. Leith commences this his first volume with the recent act to amend the law of property and trusts in Upper Canada. To the various sections are appended notes, explanatory of the defects sought to be remedied, a critical examination of the result, and as to whether the desired objects have been attained, and the present state of the law as affected by the provisions of the act.

The statutes relating to the transfer of real property next engage his attention, and the short and simple, but comprehensive explanations of the various clauses will be of great use to students, whilst many of the observations on Con. Stat., U. C., cap. 90, and the statutes which in the natural order of things follow it; the acts respecting short forms of conveyances, and short forms of leases, expose many mistakes which conveyancers have fallen into, and give valuable hints for future guidance. Our readers have already had the benefit of Mr. Leith's observations on the statutes respecting short forms of conveyances, as also the chapter in a subsequent part of the work on memorials as evidence.

The statutes governing the descent of freehold estates of inheritance come next, and are introduced by some observations on the common law rules of descent, thus enabling the reader better to appreciate the changes that have been made.

We have next the statutes respecting dower and the rights and conveyances of married women. As the learned author remarks in the preface:—

"The chapter on descent, and part of the chapter on dower are taken, with many alterations, from the work of the author on the commentaries of Blackstone adapted to the law of Upper Canada; a course justified by the alterations made, and the probability that that work will shortly be out of print"

There are some very valuable notes to the sections of the different acts which refer to the power of married women to acquire and dispose of their separate property, a subject always of much difficulty, and not by any means made clearer by the recent attempt to

give married women greater rights and privileges.

Next comes a short chapter on wills, and then the numerous statutes to make sale of and give title to real estates under writs of execution.

The next chapter is devoted to mortgages. In speaking of the late Act of 32 Vic., cap. 9, intended to "give certainty to the right of married women jointly with their husbands, to execute certificates of discharge of mortgage." He points out some of the difficulties which he thinks a statute, extended as an enabling statute are likely to lead to, thus:—

"Since the statute consolidated by Con. Stat. ch. 73, there can be but few cases wherein, when a married woman is entitled to mortgage moneys, she is not so entitled to her separate use under that statute. As far as the author is aware, it has not been usual in practice, on obtaining from a married woman a certificate of discharge of mortgage, to require compliance with Con. Stat. ch. 85: and neither where the woman is entitled to the moneys to her separate use, nor even in the few and exceptional cases wherein she is not, would such compliance appear to have been requisite. Under Con. Stat. ch. 73, she is to 'have, hold and enjoy,' free from the control and disposition of her husband as fully as if unmarried. She would be competent to receive, and give a receipt, as a *feme sole*, for her moneys, and the form of discharge given by the Registry Act is but a receipt in writing, though the Act gives it when registered, and not till then, the effect of a reconveyance. The receipt then works a reconveyance by operation of law, by force of the Registry Act; in itself it does not profess to convey. If the view of the author be correct, then the Act has considerably encroached on the rights given to a married woman by Con. Stat. ch. 73, and practically placed the obtaining of her mortgage moneys under the control of her husband."

We commend to the notice of solicitors engaged in the investment of money the remarks on fire insurance in connection with mortgages, also those with reference to powers of sale in mortgages. The statutory power can scarcely be said to be as perfect as it might be. It is a great pity that a provision which has been found of so much practical benefit, should be open to the criticisms even to which it is here subjected. Powers of sale are more and more used every day, and whether or not the form in the act respecting short forms of mortgages is defective (and it certainly is so in some re-

## REVIEWS—GENERAL CORRESPONDENCE.

spects), we cannot now well do without some provision of the kind. Probably the legislature may at an early day remedy the defects for the future, and possibly, where it can be done without injustice, confirm proceedings *bona fide* had under it heretofore.

The last chapter treats of memorials as evidence, already spoken of, and with which many are already familiar, through the pages of this *Journal*. It is a masterly article; the author's treatment of the subject having more than once been referred to from the Bench in the complimentary manner.

The volume concludes with an appendix, giving in full the important cases of *Finlayson v. Mille*, 11 Grant 218, on the law of merger, and *Moore v. Bank of British North America*, 15 Grant, 308, as to constructive notice under the Registry Act, &c., also the letter of H. Bellenden Ker, Esq., addressed to the Lord Chancellor in 1845, on the Imperial Act of 7 and 8 Vic., cap. 75, "for simplifying the transfer of property," a valuable adjunct in thoroughly appreciating our statute as to the transfer of real property, which, by the way, was mainly taken from the Imperial Stat., 8 and 9 Vic., cap. 106, framed by Mr. Ker.

Such is a short and necessarily imperfect sketch of Mr. Leith's first volume. What we here have only gives us a taste for more. The reputation of Mr. Leith as a real property lawyer is so well established that the mere fact of his having written the book before us with his usual care and caution, is, one would imagine, sufficient to command a large and ready sale. But further than this, as we are all interested in the success of this volume now in print (selfishly it must be admitted) we sincerely hope that he will receive sufficient encouragement to induce him to continue his labours, by completing the important work he has undertaken. We have now endeavoured, poorly though it may be, to do *our* share, let others do theirs, and not allow the talent we have in our midst, whether it be that of the author of this volume, or that of any other deserving author, lie dormant from want of this material assistance and encouragement, which, though they expect and ask it not, is theirs of right, and necessary to its full development.

THE ALBION, 39, Park Row, New York.

We gladly welcome week by week this "journal of literature, art, politics, finance and news." It seems to have taken a new lease of life, coming out with all the vigor of its palmiest days, and that is saying a good deal.

Judging from the following notice to subscribers, which appeared in it some short time since, we presume there is some fear on the part of those "Will-o'-the-wisp" personages of entrusting their precious mites to the tender mercies of post office authorities, thus:—"Subscribers in the United States and the Dominion are informed that they may remit money with perfect safety, and at the risk of this office, by registered letter, thus saving the trouble and expense of other methods of remittance." We commend this notice to *our* readers also, and can assure them that so far as we are concerned they need have no delicacy in making use of the post office in the same way for our benefit and at our risk.

## GENERAL CORRESPONDENCE.

*Students—Articled Clerks—Military School.*

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Would you be kind enough to give the necessary information in your next issue, whether a Student-at-Law is prevented by the rules of the Law Society from entering the Military School, that is, would they or not disallow his time while there?

Also, in the case of an articled clerk, if the clerk got the permission of the attorney to whom he is articled, to absent himself for two or three months, would a course of instruction in the Military School be considered business or occupation other than the proper practice and business of the attorney.

As there are a number of students and clerks who might attend the Military School if not prevented as above, an answer is respectfully solicited. Yours truly,

RENFREW.

Pembroke, Oct. 21st, 1869.

[We think no difficulty would arise, nor would any part of the time be disallowed if the proper consent were first obtained—  
Eds. L J.]

## DEATH OF THE CHANCELLOR—THE COUNTY JUDGES' CRIMINAL COURTS.

## DIARY FOR NOVEMBER.

1. Mon. *All Saints.*
7. SUN. *24th Sunday after Trinity.*
12. Fri. Examination of Law Students for Call to the Bar.
13. Sat. Examination of Articled Clerks for Certificates of fitness.
14. SUN. *25th Sunday after Trinity.*
15. Mon. Michaelmas Term begins.
16. Tues. Examination for Osgoode Hall Scholarships.
17. Wed. Last day for service for County Court. Interim Examination of Law Students and Articled Clerks.
19. Frid. Paper Day, Queen's Bench. New Trial Day, Common Pleas.
20. Sat. Paper Day, Common Pleas. New Trial Day, Queen's Bench.
21. SUN. *26th Sunday after Trinity.*
22. Mon. Paper Day, Queen's Bench. New Trial Day, Common Pleas.
23. Tues. Paper Day, Common Pleas. New Trial Day, Queen's Bench.
24. Wed. Paper Day, Queen's Bench. New Trial Day, Common Pleas. Last day for setting down and giving notice for re-hearing.
25. Thur. Paper Day, Common Pleas.
26. Fri. New Trial Day, Queen's Bench.
27. Sat. Declare for County Court.
28. SUN. *1st Sunday in Advent.*
29. Mon. Paper Day, Queen's Bench. New Trial Day, Common Pleas.
30. Tues. *St. Andrew.* Paper Day, Common Pleas. New Trial Day, Queen's Bench.

THE

## Canada Law Journal.

NOVEMBER, 1869.

## DEATH OF THE CHANCELLOR.

It is with feelings of extreme regret that we have to record the death of Phillip Michael Matthew Scott Van Koughnet, Chancellor of Ontario, at his residence in Toronto, on Sunday the 7th instant.

The Chancellor had been in bad health for some years, but none anticipated such a speedy termination of his brilliant, though short career. The blow was a sad one to his many friends in private life, whilst the Bench and the public can ill spare the vigorous intellect and well stored mind that presided with so much benefit in the west wing of Osgoode Hall. We shall hereafter refer more at length to the life and services of the late Judge.

The Court of Error and Appeal will sit for the dispatch of business on 8rd January, 1870.

The Toronto Winter Assizes have been fixed for the 10th January next. Mr. Justice Wilson will preside.

## THE NEW LAW FOR THE MORE SPEEDY TRIAL OF PERSONS CHARGED WITH CRIME.

A short act passed in the last session of the Parliament of Canada makes an important change in respect to criminal procedure in the case of persons committed to gaol charged with crime. It is one of those gigantic strides in legislation, the full bearing and extent of which is not at first fully perceived, but when brought into use, and its value seen, we all are apt to wonder why it was not long before placed on the statute book.

The statute, entitled "An Act for the more speedy trial in certain cases of persons charged with felonies and misdemeanors in the Provinces of Ontario and Quebec," was introduced in the House of Commons by the Hon. John Sandfield Macdonald, Attorney-General for this Province, in a brief, incisive speech, explaining the nature of the change, the objects it was designed to accomplish and the evils it was intended to remedy. The measure attracted attention from all parties, and secured universal favor and support. Intended by the Premier of Ontario to apply only to the Province of Ontario, leading lawyers and members representing the views of the Government in the Province of Quebec claimed that it should be extended to that Province also, and so, finally, the act was passed.

Never was an act making so serious a change passed with less objection. We are not surprised at this, however, in respect to the Province of Quebec, where the system of trial by jury is not interlaced with its procedure civil and criminal, as it is with us; nor would the intrinsic merit of the proposition explain its ready acceptance even in the Province of Ontario, had not the public mind been for some years tending, in a measure, towards a more satisfactory, prompt and economical mode for the decision of questions of fact than trial by jury affords. Spurned at first, then listened to coldly, finally adopted, the partial disuse of trial by jury is now quite within the memory of the public men of the day; but since the first considerable inroad was made in that system, little or no progress has been made. Our apathy, or, it may be, our conservatism in legal matters stood in the way of further material progress until within the last few years, when modern enlightenment and the clamor for economy

## THE NEW COUNTY JUDGES' CRIMINAL COURTS.

and speed in administration, if not the steady tide of human progress has opened to us sounder and better ways of dealing with legal procedure. The first great step was in the establishment in Upper Canada of a complete system of local administration which provided crown prosecutors in every judicial district in the country, a body of officers, trained men, taken from the bar, appointed by the Crown, and directly under the Government, to conduct and direct prosecutions against persons charged with crime. Since the federation of the British American Provinces, trial by jury in Ontario has been seriously curtailed by two acts of Parliament, and the idea seems to be gaining ground, that the mode of disposing of cases both civil and criminal by a judge alone will be the rule rather than the exception, and that the Benthamite idea of "single seated justice" will supersede the jury tribunal, which many in the present day believe fails in most cases to answer any valuable purpose.

The design of the act before us, shortly stated, is this: to secure the trial of persons charged with crime with the least possible delay and at the least possible expense. Not that proceedings are intended to be hurried forward with reckless and indecent haste, or, to use the language of Mr. Justice Gwynne's address, elsewhere appearing, that "a slipshod mode of administering Justice, which is far from the intention and design of the act, and which would mar its provisions and deform its symmetry," should prevail. No; on the contrary, it was manifestly intended that the tribunal established under the act should follow a procedure suited to "single seated justice," and calculated on the one hand, to guard, as far as possible, against a failure of justice, and, on the other, to preserve to persons charged with crimes all proper safeguards against indefinite charges as well as to prevent too hasty proceedings against them. In explaining the powers and purposes of the new tribunals, we shall speak of them as their practice has been elaborated in detail, under a uniform code of rules in force in every county in Ontario. On another occasion, we purpose speaking in respect to these rules, devised by the three senior members of the Board of County Judges, and which, under the fostering approval of the Attorney-General, are now the law of the several courts.

It is a matter of regret, we think, that the new law has not force all over the Dominion, that it has been extended only to this Province and the Province of Quebec. We do not know how the Maritime Provinces are circumstanced; but for this Province, as might be expected, the act has a *peculiar fitness*. Ontario is divided into thirty-six judicial districts, each composed of one or more counties, with a resident judge in each judicial district who presides over all the local courts, civil and criminal therein, each with a complete court establishment, with Sheriff and other ministerial officers, a court house, and gaol, as in English counties, and with, moreover, a local officer, whom they have not in England, a *local crown prosecutor*, to take charge of and conduct criminal prosecutions in each judicial district. In this Province, therefore, the act comes into full operation without complication or disturbance of existing institutions, and is, it seems to us, in one sense, the necessary compliment to the excellent system which was introduced by Sir John A. Macdonald by the County Crown Attorney Act.

By the act now under consideration, each local judge in Ontario sitting under the provisions of the statute, and for every purpose connected with or relating to the trial of offenders, is created a court of record. No regular sittings are appointed, but the court sits from time to time as occasion may require. The Clerk of the Peace is appointed to act as clerk of the court, and the sheriff acts in the same way as in other criminal courts.

The *jurisdiction* of the court, as respects the nature of the charge, extends to "all offences for which a prisoner may be tried at a General Session of the Peace," in other words, to *nearly every crime, short of a capital felony, known to the law*; and if convicted, "such sentence as the laws allows and the judge thinks right" may be passed upon the convicted person. The jurisdiction, however, is limited to persons committed to gaol on such charges and consenting to be tried by the judge.

The *procedure* is this: within twenty-four hours after a prisoner is committed to gaol for trial upon any such charge, the sheriff notifies the judge of the fact, and when the local prosecutor is ready to proceed (having received and examined the depositions and papers which the law requires to be laid before him

## THE NEW COUNTY JUDGES' CRIMINAL COURTS.]

for the purpose) he informs the judge, and an order is at once issued, and under it the prisoner is brought before the judge in open court. A formal accusation in the nature of an indictment describing the offence (prepared in the meantime by the public prosecutor from the depositions, &c.) is then read to the prisoner by the judge, as the charge against him. The prisoner is then informed by the judge that he has the option of being forthwith tried by the judge without the intervention of a jury, or remaining untried till the next Court of General Session of the Peace, or Oyer and Terminer. If the prisoner, as he has a right to do, declines the jurisdiction and demands a jury, he is remanded to gaol. If he consents to be tried by the judge, he is at once arraigned and called upon to plead to the accusation. If the prisoner pleads "guilty," sentence is at once passed. If his plea be "not guilty," his trial is at once proceeded with, if the crown and prisoner are both ready, or if not ready, the proceedings are adjourned to an early day. On that day the trial is entered upon, but may be further adjourned in the discretion of the judge for the purpose of completing the evidence for the crown, that is, before the prisoner has gone into his evidence; or to enable the prisoner to produce other and further evidence, of which he was not aware at the time he entered on his defence, as being material thereto. The rule as to the other proceedings and as to evidence at the trial is the same as in ordinary cases, and before passing sentence upon the prisoner the same questions will be asked as in other criminal courts, and if the prisoner has anything to urge why judgment should be arrested, or why sentence should not be passed, it is to be heard and determined by the court. None but Barristers-at-law will be heard as counsel.

This, in very brief outline, is a summary of the constitution of the court and its procedure. We have heard objections to this new law by some "that the power is too large to be vested in a single individual." As regards the *law* in each case the judge has no greater or larger powers than the judge acting at the "Sessions" or "Assizes;" but in being sole judge of the *facts*, and substituting the judge for a jury, his powers are certainly new. No doubt the step is a bold and decided one, but it is offered as an effort in the way of rendering

justice more expedient and satisfactory to the public at large. As such, we accept it, and believe, with proper care in administration, the new courts will be a great improvement in the criminal law of the country. We have heard again that certain of the judges shrink from the work as an unpleasant and painful task, but it is now a *duty* on their part to do all in their power to give beneficial effect to the law, and if only zeal and courage with discretion be brought to the work, the new law must be a success; and we argue most favorably from the fact that the judges, one and all, have joined with such harmony towards a settled procedure.

It was the saying of a profound thinker, that, in respect to alterations in the law, "it is good not to try experiments except the necessity be urgent or the utility evident." We agree in this, and will call attention to a few matters showing, we think, conclusively that some change was called for, and that the substitute for the old procedure is vastly superior to the latter, and more calculated to render, in the language of the Attorney-General, "the administration of criminal justice more expeditious and satisfactory."

Who will not admit that it is a matter of high concern that persons in prison should be speedily tried; if innocent, they have the earliest opportunity for showing it; if guilty, their prompt punishment is secured, a matter of almost equal importance. If the offence be trifling, the time of imprisonment between committal and trial will often be a far greater punishment than the offence calls for. Imprisonment in a common gaol, it will also be admitted, is calculated to injure and deteriorate the position and character of any man, whether he be innocent or whether about to enter on the career of crime; and with the young, the associations of a prison are commonly productive of the most disastrous results, for young persons are brought, it may be for the first time, in contact with criminals and tainted with intercourse with them, or the vicious youth becomes hardened in vice by association with old criminals, or criminals more hardened than himself.

The expense of supporting persons in the common gaols is very great, and is borne by the localities, and it was impossible to guard against lengthened imprisonment without trial,

## THE NEW COUNTY JUDGES' CRIMINAL COURTS.

while persons charged with crime could only be tried at the regular courts.

All these manifest evils—too manifest to need more than naming to shew that some remedy was necessary—the act under consideration is well calculated to remedy. Take the case of an innocent person committed for trial after the close of a criminal court. He might under the old law, however ready and anxious for trial, be obliged to remain in gaol some four months before being tried; now he can within a few days be tried before the County Judges' criminal court, and have the opportunity of at once establishing his innocence. As to the nature of the tribunal, what intelligent man, conscious of innocence, would not prefer being tried before an educated man, trained to the investigation of facts and above the reach of irregular influences rather than by a number of men, taken from the general community, utterly unacquainted with the investigation of facts, and with but little scope for the exercise of their reasoning powers.

Again, a trifling larceny or other offence is committed. The party arrested is perhaps unable to procure bail (as must often be the case in a moving population, or when it is recruited by emigration), and has to undergo months of imprisonment when probably his sentence would be only for a few days. We know of many instances of cruel hardships in cases of this kind without any means of relief. Under the present law it is quite possible that the prisoner can be tried and sentenced to appropriate punishment within forty-eight hours after his commitment. We need not enlarge upon the evils of protracted imprisonment, and the mingling of the young with the more hardened criminals. The point was well put by Mr. Justice Gwynne in his address to the grand jury at the "Frontenac Assizes:—

"Grand juries," said the learned judge, "will have reason to rejoice in the diminution of labor falling upon them when the act shall have come into perfect operation, and the accused parties will have equal reason to rejoice that an opportunity is presented them of relieving themselves from that confinement previous to trial, which the old mode of procedure necessitated: much of the evil incident to the incarceration of persons who may be innocent with those who may be guilty, and of those guilty of minor offences with those who may be guilty of more heinous offences and arising from the associations and intercommuni-

cations of vice thus introduced will be also avoided."

The saving of expenses is the lowest ground that can be taken, but is probably the ground that will be most operative with people in general—for what may be refused to the soundest argument will often be promptly conceded to a popular cry for economy or a business-like necessity. We do not desire to undervalue economy in administration, but would not give undue prominence to an argument upon it, when the proposition, as in this case, is plainly recommended by higher considerations; but that there will be an enormous saving in gaol accounts for the maintenance of prisoners under the new law cannot be doubted. We have heard it estimated at fifty per cent. or more, and from the enquiries we have made think the estimate not excessive. The diminution of cases for the regular courts will also effect a saving, and it must be a considerable one, seeing that some sixty jurors as well as the officers of the courts are under daily pay, and if a number of prisoners are to be tried the court must be necessarily delayed; all this without speaking of the loss and the delay to suitors and witnesses in civil cases. Not that the work of the new court is to be done for nothing,—the ministerial officers engaged must be paid, and it would be wise and just to pay them liberally,—but it would take the expense of a great many trials before the County Judge to equal the cost of a single day at the assizes or sessions.

The County Judge's criminal court will be, if we may be permitted the expression, *a court of perennial gaol delivery*: a key always at hand to open the prison doors to the innocent; and in this aspect alone any outlay necessary in making the tribunal thoroughly efficient and safe would be amply justified.

The new law has been most favorably received by the thinking men, and so far has been, again to use the language of Mr. Justice Gwynne, "eminently successful, and prisoners have largely availed themselves of the opportunity afforded them for a special trial; that success will continue to attend the measure commensurate with so good a beginning, there is every reason to hope and believe."

There are many considerations in respect to the new law upon which we shall have occasion to remark hereafter; at present we must bring

## COUNTY JUDGES' CRIMINAL COURTS.

this article to a close by invoking the judges and officers connected with the new jurisdiction, and upon whom the duty of carrying out the act devolves, to be *earnest and zealous* in endeavouring to secure all the benefits it was designed by its author to accomplish, and which the government of this Province is bent on securing. The act at present may be said in a certain sense to be upon trial; it may, and with wise and careful administration must remain a permanent addition to our system of criminal jurisprudence, but it *may* be brought into disrepute and its vitality destroyed. Amongst all the wise utterances of Lord Bacon there is none more true than this, "that the life of a law lies in the due execution and administration of it," and it is well that it should be known and felt that with the County Judges and County Attorneys rests the administration of this, one of the most important criminal acts on the statute book of Canada.

## COUNTY JUDGES' CRIMINAL COURTS.

The following is an extract from the address of the Hon. Mr. Justice Gwynne to the Grand Jury at the last Assizes for the County of Frontenac:—

"It is proper, gentlemen, that I should draw your attention to recent legislation, with a view to facilitate the administration of criminal justice. The legislature of United Canada had from time to time passed various acts having this object in view, which have very materially diminished the labours of grand jurors; but a further step in advance has been made by the Dominion Legislature in its last session by the enactment of a law entitled 'An Act for the more speedy trial in certain cases of persons charged with felonies and misdemeanours in the Provinces of Ontario and Quebec.' The idea of this enactment emanated, I believe, from the head of the government of this Province, who (the matter being within the jurisdiction of the Dominion Legislature) procured the introduction of the bill for the purpose into the house by the government of the Dominion, and it is gratifying to see that its provisions were approved and promptly adopted in reference to the Province of Quebec. By this act it is provided that any person committed for trial on a charge of being guilty of any offence which may be tried at a court of general sessions of the peace, may, with his own consent, be tried out of sessions, and if convicted, be sentenced by the judge of the county court. It is made the duty of the sheriff immediately upon the party

being committed to his custody to communicate the fact and the offence charged to the judge of the county court who is thereupon required to have the accused brought before him, and to give him the opportunity, if he chooses to avail himself of it, of undergoing a speedy trial before the judge alone without a jury. During the short time that the Act has been in force it has proved to be eminently successful, and prisoners have largely availed themselves of the opportunity thus afforded to them. That success will continue to attend the measure, commensurate with so good a beginning, there is every reason to hope and believe. The Judge sitting upon any such trial, for all the purposes thereof, and the proceedings connected therewith or relating thereto, is constituted a Court of Record. As such, he will have the incidental power of establishing such rules for the regulation of proceedings under that statute as he shall deem expedient and best calculated to advance the object of the Act. Where there are so many courts it is obviously much to be desired that a uniform code of rules should prevail in all the courts; uniformity of procedure in all courts of co-ordinate jurisdiction is always desirable, but in matters of criminal procedure it seems to be essentially necessary, lest a slipshod mode of administering criminal justice, which is far from the intention and design of the act, should grow up, which would mar its provisions, deform its symmetry, and bring it into disrepute. It is pleasing to see, as I learn is the fact, that the gentlemen upon whom devolves the duty of giving effect to the Act, recognise the importance of the establishment of such a uniform code of rules, and that the county judges themselves have undertaken the task of agreeing upon a code which will be enacted by each court as the mode of procedure to be adopted in it so that the requisite uniformity may be preserved. As courts of record they no doubt possess this power, without any legislative provision for the purpose. There is reason, then, I say to hope and believe, that under the co-operative action of all the learned judges of the county courts, the object of the Legislature will be attained, and success will continue to attend the measure. Grand juries will have reason to rejoice in the diminution of labor falling upon them when the act shall have come into perfect operation, and the accused parties will have equal reason to rejoice that an opportunity is presented them of relieving themselves from that confinement previous to trial, which the old mode of procedure necessitated; much of the evil incident to the incarceration of persons who may be innocent with those who



## LAW SOCIETY—CHIEF JUSTICE RICHARDS—ITEM.

may be guilty, and of those guilty of minor offences with those who may be guilty of more heinous offences and arising from the associations and intercommunications of vice thus introduced will be also avoided."

The rules referred to were originally prepared by Judges Gowan, Jones and Hughes, the three senior members of "The Board of County Judges" for use in their own counties, but, at the instance of the Attorney-General, Judge Gowan the chairman of the Board, sought the co-operation of all the County Judges in securing a uniform procedure under the act. Every County Judge in Ontario has, we are glad to learn, responded to Judge Gowan's suggestion by adopting the Rules, and now the "object so much to be desired, a uniform Code of Rules" prevails in all the Courts, a matter "essentially necessary in the administration of criminal justice."

LAW SOCIETY—MICHAELMAS TERM,  
1869.

The following is the result for the examinations this Term:

## CALLS TO THE BAR.

J. T. Garrow, Goderich; George Gibbons, London; Chas. Moss, Toronto; W. W. Fitzgerald, London (without oral examination). H. J. Woodside, Toronto; H. Lapierre, Ottawa; J. R. Wilson; Geo. Kerr, jun., Perth; Samuel Burdett, Belleville; J. H. King, B.A., Berlin; Wm. Davidson, B.A., Berlin; Wm. Watt, B.A., Brantford; W. G. Hannah, Toronto; W. Dudley, Newmarket; Charles E. Anderson (Quebec Bar).

## CERTIFICATES OF ADMISSION.

W. G. P. Cassels, B.A., Toronto; J. R. Wilson, B.A., Alexandria; H. J. Woodside, Toronto; W. W. Fitzgerald, London; W. Fitzgerald, B.A., Toronto; George Gibbons, London; George Kerr, jun., Perth; J. W. Sharpe, Toronto (without oral examination). Henry Carscallen, Hamilton; A. Williams, B.A., Toronto; A. Keating, Barrie; G. Elliot, Toronto; Wm. Watt, B.A., Brantford; A. W. Francis, Toronto; H. C. Greene, Toronto; T. D. Delamere, M.A., Toronto; Peter Barker, B.A., Toronto; Wm. Davidson, B.A., Berlin; W. G. Hannah, Toronto; H. P. Hill, Ottawa; J. A. W. Hatton, Peterboro'; E. B. Sanders, Barrie.

## SCHOLARSHIPS.

*Fourth Year*

Maximum number of marks 400.

Samuel R. Clark (Scholarship)..... 835

*Third Year.*

Maximum number of marks 320.

John Crevar (Scholarship) ..... 288

G. W. Badgerow ..... 272

Francis Chrystler ..... 264

W. H. Bartram ..... 245

*Second Year.*

R. M. Fleming (Scholarship) ..... 286

John Akers ..... 245

*First Year.*

Wm. Hogg (Scholarship)..... 290

Chief Justice Richards having been granted six months leave of absence, was not in Court since the first Friday of this Term. Mr. Justice Morrison, senior Pusine Judge of the Court of Queen's Bench, taking his place.

We sincerely trust that the cessation from his arduous duties, for at least two Terms, will have the effect of restoring, in a great measure, the health of the learned Chief Justice, which has been in a very unsatisfactory state for some years past. His absence will be a great loss to the Court, but none will grudge him a holiday, and all will welcome his return in renewed health and strength.

The Court of Queen's Bench, in giving judgment in a recent case, when discussing the right of Courts of Quarter Sessions to grant new trials, incidentally alluded to a practice which is as derogatory to the dignity of the Bench as it is alien to the traditions of the honorable profession to which we belong:

"We think the learned chairman of the Quarter Sessions would have been warranted by the established practice at the Assizes, in refusing to allow the party to call further witnesses, or his counsel to address the jury, after the undoubted established facts had clearly shewn, in the opinion of the court, that he had made out no case. It is unseemly to allow a counsel to address a jury, and to urge them to find a verdict against the ruling of the court, when the court itself will be obliged to tell the jury to find the other way. In such a contest the juries are in truth made the judges instead of the court, and the judge enters the arena as a contestant with the advocate for a favourable decision. Such displays are not calculated generally to assist in the administration

## BILL BEFORE THE LEGISLATURE.

of justice, or to induce respect towards those concerned in such administration."

The duty of counsel is not to try "to make the worse appear the better cause," but to assist the Court in arriving at a proper decision. Attempts to mislead juries recoil on the heads of the perpetrators, who are sooner or later found out, and then woe betide their clients. Many are the advantages of our system of amalgamating the professions, let us try as much as possible to avoid the evils which may, unless restrained by close attention to professional ethics, readily spring from it.

## BILLS BEFORE THE LEGISLATURE.

The following Bills are now under the consideration of the Local Legislature. The Act to Amend the law of Evidence, which we give below was introduced by Mr. Blake. There is also another to the same effect, brought in by Mr. Clarke, which having passed the second reading, after strong opposition from the Attorney General and others in the government, was, together with Mr. Blake's bill, referred to a select committee:—

*An Act to amend the law of Evidence.*

Whereas the inquiry after truth in civil cases in the Courts of Justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony, and it is expedient to amend the law of evidence in this Province: Therefore her Majesty, &c., enacts as follows:

1. No person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence either in person or by deposition, according to the practice of the Court on the trial of any issue joined, or of any matter or question, or on any enquiry arising in any civil suit, action or proceeding in any Court or before any judge, jury, sheriff, coroner, magistrate, officer or person, having by law or by consent of parties authority to hear, receive and examine evidence, but that every person so elected may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question or in the event of the trial of any issue, matter, question or enquiry, or of the suit, action or proceeding in which he is offered as a witness, and not-

withstanding that such person offered as a witness may have been previously convicted of any crime or offence.

2. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any civil suit, action or proceeding in any Court of Justice, or before any person having by law or by consent of parties having authority to hear, receive and examine evidence, the parties thereto and the persons in whose behalf, any such suit, action or proceeding may be brought or defended shall, *except* as hereinafter excepted, be competent and compellable to give evidence either *visa voce* or by deposition, and the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action or proceeding may be brought or instituted or opposed shall, *except* as hereinafter excepted, be competent and compellable to give evidence either *visa voce* or by deposition according to the practice of the Court on behalf of either or any of the parties to the said suit, action or other proceeding.

3. Nothing herein contained shall in any civil proceeding render any person compellable to answer any question tending to criminate himself or to subject him to prosecution for any penalty.

4. Nothing hereinbefore contained shall apply to any action, suit, proceeding in any Court of Common Law instituted in consequence of adultery or to any action for breach of promise of marriage, nor shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband in any proceeding instituted in consequence of adultery.

5. No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.

6. Sections three, four, five, and eighteen of the Act, chapter thirty-two of the Consolidated Statutes of Upper Canada, entitled, An Act respecting Witnesses and Evidence, are hereby repealed.

Mr. Blake also brings in the following Bill

*An Act to make better provision for the realization of the debts of deceased persons out of their lands.*

Whereas it is expedient, &c.: Therefore Her Majesty, &c., enacts as follows:

1. In this Act, the words, "the personal representative," mean the person to whom letters of administration of the estate, or letters probate of the will of any deceased person, are granted by any Surrogate Court of Ontario; the word "land" means any freehold, interest or estate, legal or equitable in any land in Ontario; the word "beneficiary" means any person interested as heir-at-law, or under the will of any deceased person in any

## BILLS BEFORE THE LEGISLATURE.

land, or any one claiming, by devise or descent, under any person so interested.

2. The personal representative or any one or more of the personal representatives may, at any time, file in the Surrogate Court by which the letters were granted, the following papers, all verified under oath:—

(1). A detailed inventory of the personal estate of the deceased, shewing the value of each item;

(2). A detailed statement of the debts and funeral and testamentary expenses of the deceased;

(3). A detailed statement of the lands of the deceased, showing the supposed interest of the deceased in each parcel, and the estimated value of such interest, and the amount of incumbrance, if any, on the parcel, and showing the order in which it would be most for the advantage of the beneficiaries that the lands should be sold;

(4). A statement showing such further particulars as shall be proper for the information of the Judge.

3. Any creditor of the deceased may, at any time after the expiration of six months from the date of the grant of letters, file in the Surrogate Court by which the letters were granted, an affidavit showing that he is such creditor; that he has applied to one of the personal representatives for payment of his debt; that it has not been paid, and that in his belief, the personal estate of the deceased is insufficient to pay the debts of the deceased, and may thereupon apply *ex parte* to the said Court for an order directing the personal representative to file in the said Court, the several statements mentioned in the second clause of this Act.

4. Upon such application, the Judge shall if the affidavit is satisfactory, make an order directing the personal representative to file the said statements in the said Court within fourteen days after the service on him of such order.

5. In case there is more than one personal representative and one or more of the personal representatives is absent from the Province of Ontario, or cannot be found, the Judge may dispense with service of any process, under this Act, on such one or more of the personal representatives.

6. The personal representative shall file the said statements, verified under oath, within the time limited, or such further time as, on his application made during the said fourteen days, on two clear days' notice to the creditor, the Judge may allow.

7. In case the personal representative makes default in complying with the said order, or the statements filed by him are unsatisfactory, the Judge shall, on the application of the creditor, order that the personal representative do attend before him, or before the Registrar of the said Court, with the books and papers of the estate for examination, at a time fixed

by the order, and the personal representative, in upon due service of such order, shall attend, pursuant thereof, with such books and papers and may be examined on oath, on behalf of the creditor, before the Judge or Registrar touching the various matters to be comprised in the said statements, and shall answer all such relevant questions as may be proposed to him, and his examination shall be reduced to writing, and signed by him, and by the Judge or Registrar.

8. [Representative may be committed if he disobey's Judge's order.]

9. In case the statements made by the personal representative are incomplete, the creditor may file statements, verified under oath in completion thereof.

10. At any time, after the filing of the statements, the personal representative or any creditor of the deceased, may apply to the Judge for an order for the appointment of a real representative of the deceased, and the sale of so much of the lands of the deceased, as having regard to the value of the personal estate, may be necessary for the payments of the debts.

11. At least seven days' notice of such application shall be given by the applicant to one or more of the beneficiaries, and also to the personal representative, if he be not the applicant.

12. Upon the hearing of the application, the Judge may require any other or others of the beneficiaries to be served with notice thereof; and he may, in case it is made to appear to him that all the beneficiaries are absent from the Province of Ontario, or cannot be found, dispense with service of notice on any of them, and he may require further evidence on any of the questions before him, and he may adjourn the hearing of the application.

13. Every person notified shall be deemed a party to the proceedings; and any beneficiary, though not notified, may attend the proceedings as a party, and any beneficiary so attending, shall be deemed a party to the proceedings.

14. In case two or more distinct applications for any order authorised by this Act are made, the Judge shall have power to consolidate the applications, and to make such orders and give such directions as to the prosecution thereof, as shall seem best adapted for the speedy and economical disposal thereof.

15. Upon any application for any order authorised by this Act, the Judge may, at the instance of any of the parties, or for his own information, require the attendance of, and examine, or cause or permit to be examined, on oath or affirmation, as the case may be, any of the parties and witnesses *viva voce*, or by interrogatories; and the Judge may, by writ of *subpoena* or *subpoena duces tecum*, as the case may be, command such attendance, and cause any deeds, evidences or writings to be produced before himself or otherwise.

## BILLS BEFORE THE LEGISLATURE.

16. [Powers of Judge to compel attendance, be the same as in other courts.]

17. The enquiry to be had before the Judge as to the value of the personal estate, and the amount of the debts and funeral and testamentary expenses, shall be of such general character as may be sufficient to enable the Judge to arrive at approximate results, and shall not involve an administration of the estate; and if, upon such general enquiry, the Judge finds that there are complicated or contested matters without a determination on which he is unable to come to a conclusion as to the order to be made, he may direct that proceedings shall be taken in the proper Court for the administration of the personal estate of the deceased, and may in the meantime adjourn the application.

18. Upon the final hearing of the application for an order for the appointment of a Real Representative, and for the sale of lands, the Judge shall, if it appears to him that the personal estate is insufficient for the payment of the debts, make an order for the appointment of a real representative of the deceased, and for the sale of so much, and such part of the lands to be specified in the order, as in his judgment it may having regard to the amount of the personal estate, be necessary to sell, in order to pay the debts, funeral and testamentary expenses, and the expenses of administration, and the order shall be in the form contained in Schedule A to this Act.

19. In case the personal representative, or any one or more of the personal representatives, is or are willing to become the real representative, he or they shall have the *prima facie* right to be appointed, but it shall not be obligatory on the Judge to appoint him or them, if for any reason the Judge shall be of opinion that it would be inexpedient to do so.

20. The sale shall be by public auction, for cash, according to the standing particulars and conditions of sale contained in Schedule B to this Act, except in so far as the same may in any case be varied by the Judge.

21. Upon the same application on which the order is made, the Judge shall settle the particulars and conditions of sale, name the auctioneer, and settle the advertisement or advertisements of sale, which shall be signed by him, and which shall be published by the real representative for at least three months before the sale, in the *Ontario Gazette*, and in some newspaper to be named by the Judge in each county where the lands lie, and in such other ways, if any, as the Judge shall direct.

22. The advertisement shall contain the following particulars:—

- (1). The style of the matter.
- (2). That the sale is in pursuance of an order of the Judge.
- (3). The time and place of sale.
- (4). A short and true description of the

land to be sold, and a statement of the interest therein which is to be sold.

(5). The manner in which the land is to be sold, whether in one lot or several, and if in several, in how many, and what lots, and in what order.

(6.) Any particulars in which the proposed conditions of sale differ from the standing particulars and conditions of sale.

23. [Judge may change auctioneer.]

24. Forthwith, after the making of the order, the real representative shall procure and forward to the proper Registry Office for registration, a duplicate thereof under the seal of the Court; and each such duplicate shall be registered by the proper Registrar, against every lot within his county comprised in it, on payment of the sum of fifty cents for each lot.

25. Every instrument executed by any beneficiary, after the registration of the order for sale, or executed before, and not registered in the proper Registry Office at the time of the registration of the order for sale, and every conveyance upon a sale under any execution against the lands of any beneficiary, executed by the Sheriff after the registration of the order for sale, or executed before, and not registered in the proper Registry Office at the time of the registration of the order for sale, shall be fraudulent and void, as against the title acquired upon a sale under the order.

26. Every instrument executed by any beneficiary, and registered before the registration of the order for sale, and every conveyance made by the Sheriff upon a sale under any execution against the lands of the beneficiary, and registered before the registration of the order for sale, shall be valid, void or voidable, as against the title acquired upon a sale under the order, according as the same would under the law in force at the time of the passing of this Act, have been valid, void or voidable at law or in equity, as against the claims of creditors of the deceased.

27. In case it appears that any such instrument or conveyance as is mentioned in the last preceding clause of this Act has been registered before the registration of the order for sale, or in case it appears that the title of the deceased is disputed by some person setting up an adverse claim, the real representative, or any of the parties may apply to the Judge for an order that the Real Representative shall take proceedings to establish the right to sell; and if the Judge so orders, the Real Representative shall file a bill or present a petition, under the Act for quieting titles, in the Court of Chancery for Ontario, for that purpose; and the said Court shall have jurisdiction at his instance to decide upon the validity of the instrument or conveyance, or of the adverse claim set up, subject to the same appeal as in other cases in the said Courts, and in the meantime the Judge shall adjourn the sale

## BILLS BEFORE THE LEGISLATURE.

under the order of the land which is the subject of the instrument or conveyance, or of the adverse claim.

28. After the sale is concluded, the auctioneer shall make an affidavit in the form contained in Schedule C to this Act.

29. After any sale under this Act, the real representative shall, within seven days (and in case of default by him, the purchaser or any other person interested, may, at any time after seven days,) file in the Court the auctioneer's affidavit, and affidavits proving the due advertisement, and proving the contract of sale.

30. At any time during the seven days next after the filing of such affidavits, any party to the proceedings, or any beneficiary, may apply to the Judge on notice to the real representative and the purchaser, for an order to set aside the sale, and for a re-sale, on the ground that the sale was not duly advertised, or was not made fairly, openly, or in a proper manner.

31. In case such application is made, the Judge shall, if it appears to him that the sale was not duly advertised, or was not made fairly, openly, or in a proper manner, set aside the same and order a re-sale.

32. In case such application is not made, or fails, the sale shall, at the expiration of seven days after the filing of such affidavits, stand confirmed.

33. The purchaser may, within seven days after the confirmation of the sale, demand an abstract of title from the vendor; and if he does not so make such demand, he shall be deemed to have accepted the title.

34. If the purchaser does so make such demand, the vendor shall forthwith comply with the same, and the purchaser may, within seven days, serve objections to the abstract, and if he does not so serve such objections, he shall be deemed to have accepted the abstract as sufficient.

35. If the purchaser does serve such objections, the vendor shall answer them within fourteen days from the date of service; and if the purchaser is still dissatisfied, any of the parties may obtain from the Judge an appointment to consider the abstract.

36. The Judge shall determine all questions upon the abstract, and the sufficiency thereof, and if desired by the purchaser may require the vendor to make the same as perfect as he can; and if the vendor neglects or refuses to do so, may permit the purchaser to supply defects therein, at the vendor's expense.

37. The Judge shall mark the objections allowed or disallowed, as the case may be, and when he finds the abstract perfect, or as perfect as the vendor can make it, he shall certify to that effect at the foot, or on the back thereof.

38. After the abstract is allowed, or is accepted by the purchaser as sufficient, no objection to the abstract shall be allowed.

39. After the abstract is allowed, or is accepted by the purchaser, the verification shall be proceeded with, and the vendor shall with all diligence, afford the purchaser all the means of verification in his possession, in the manner and according to the practice usual with conveyancers, and having done so he may serve a notice on the purchaser to make his objections or requisitions, if any.

40. The purchaser may, within seven days thereafter, serve his objections or requisitions; and if he does not so serve the same, he shall be deemed to have accepted the title.

41. If the purchaser does so serve the same, the like course is to be followed upon the same as is hereinbefore provided, in relation to the abstract.

42. After the title is accepted or allowed, no objection thereto shall be allowed.

43. At any time after the title is accepted or allowed, the vendor or any person interested, may apply to the Judge on seven days' notice, for an order for the payment by the purchaser of any part of the purchase-money which is due and unpaid, and the Judge may order payment thereof to the vendor; and in default of payment within seven days after the date of such order, writs of execution for the recovery thereof, may issue under the seal of the said Court, in like manner as such writs issue on judgments recovered in the Courts of Common Law.

44. At any time after the title is accepted or allowed, the vendor or any person interested may apply to the Judge on seven days' notice, for an order for the delivery of the possession of the lands to the vendor, by any beneficiary who may be in the possession thereof, in order to the delivery by the vendor of the lands to the purchaser; and the Judge shall order the delivery of such property to the vendor; and in default of such delivery, within seven days after the date of such order, a writ or writs of *habere facias possessionem*, may issue under the seal of the said Court, for the recovery thereof, in like manner as such writs issue on judgments recovered in the Courts of Common Law in actions of ejectment.

45. At any time after the title is accepted or allowed, and the purchaser has paid his purchase-money, he may apply to the Judge on seven days' notice for an order for the delivery to him of the possession of the lands by the vendor, if the vendor be in possession thereof, or by any beneficiary who may be in possession thereof, and the Judge shall order such delivery; and in default of such delivery, within seven days after the date of such order, a writ or writs of *habere facias possessionem*, may issue under the seal of the said Court for the recovery thereof, in like manner as such writs issue on judgments recovered in the Courts of Common Law in actions of ejectment.

46. At any time after the confirmation of

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the sale, the real representative may, on payment of the purchase-money, execute a conveyance to the purchaser of the premises sold, and the Judge shall certify on the margin of the first page of such conveyance, under his hand, and the seal of the Court, that the sale thereby made has been confirmed.

47. The conveyance so executed shall vest in the purchaser and his heirs, all the estate which was of the deceased at the time of his death, in the land, as effectually as if such conveyance had been executed by all the beneficiaries, as granting parties; and it shall not be necessary for any person claiming under the conveyance to produce or prove, in order to establish the conveyance, anything beyond the order for sale, and the conveyance so certified as aforesaid.

48. In proceedings under this Act, the Judge shall have power to determine how the costs of the proceedings shall be borne and paid, and may order them to be paid out of the estate of the deceased or by any of the parties, or partly out of the estate and partly by any of the parties.

49. The proceeds of any sale under this Act shall be applied by the real representative in or towards the payment of any costs ordered by the Judge to be paid thereout, and of the costs of the sale, and thereafter in or towards the payment of the debts and funeral and testamentary expenses of the deceased, in the same manner as the same should be applied if the said proceeds were personal estate come to the hands of the real representative, and the real representative shall be liable to the creditors of the deceased in respect of the said proceeds in the same manner and to the same extent as the personal representative would be liable to such creditors in respect of personal estate come to his hands; but the said proceeds shall, subject to the application thereof aforesaid, be deemed and taken to be the proceeds of the real estate of the beneficiaries in the hands of the real representative as trustee for the beneficiaries.

50. [Real representative to give bond as security in form given.]

51. [Penalty in bond to be double the value of lands. Judge may direct as to bonds.]

52. [If condition broken, bond to be assigned by Judge's order for suit.]

53. [Real representative may be removed, &c., on seven days' notice, and new one appointed, &c.]

54. The Judge may allow to the real representative a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the discharge of the duties devolving on him as real representative, and therefor, may make an order or orders from time to time, and the amount so allowed may be returned by, and shall be allowed to the real representative in passing his accounts.

55. Any person who has made an applica-

tion for the appointment of a Real Representative, and for a sale of lands, or to whom notice of such an application has been given, or who has appeared on such an application, may appeal to the Court of Chancery from the order made on such application within fourteen days from the date of such order.

56. Any beneficiary to whom no notice of an application for the appointment of a real representative, and for a sale of lands has been given, and who has not appeared on such application, may at any time before the sale apply to the Court of Chancery to reverse, vary, or suspend the order made on such application.

57. Any person affected by any order or ruling of a Judge made on any application, or in any proceeding other than an application for the appointment of a real representative and for the sale of lands, may appeal to the Court of Chancery for such order or ruling within seven days from the date thereof.

58. [Chancery may reverse, vary, &c.]

59. In case it appears that for any reason the proceeds of the land sold under any order for sale are insufficient to pay the debts, funeral and testamentary expenses and the expenses of administration, the real representative, or any other person who might have made the original application, may apply to the Judge on affidavits of the material facts for an order for the sale of other lands of the deceased.

60. The proceedings on such application shall be conducted as nearly as may be in like manner as proceedings on an original application under this Act, dispensing with all such proofs as have been furnished on the original application.

61. The Judge shall have like powers with reference to the subject matter of such application as are conferred on him in respect of the original application.

62. After this Act takes effect, no writ of *feri facias de terris* shall issue on any judgment recovered against a deceased person in his lifetime and revived against his personal representative, or on any judgment recovered against the personal representative of a deceased person in his representative capacity.

63. Nothing in this Act contained shall in anywise affect or impair the jurisdiction of the Court of Chancery in the administration of the estates of deceased persons.

64. No order for the appointment of a real representative, or for the sale of lands of a deceased person, shall be made under this Act, after a decree for the administration of the real estate of the deceased person has been made.

65. [Judges of Surrogate Court to take fees, as in Schedule.]

66. [Registrars, Solicitors, &c., to have certain fees.]

67. [Judges in Chancery may make orders and forms and fix fees.]

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68. All proceedings under this Act may be styled, "In the matter of the lands of (A.B.), a deceased debtor, and of the Deceased Debtors' Land Act, 1869."

69. [Judges, Commissioners, &c., may administer oaths.]

70. This Act shall come into force on the first day of February, in A.D. 1870, and may be cited as "The Deceased Debtors' Lands Act, 1869."

## SCHEDULE A.

In the matter of (A.B.), a deceased debtor, and of the Deceased Debtors' Lands Act, 1869.

Upon the application of (C. D.) on notice to (E. F.), and in the presence of (C. D., E. F. and G. H.), I do hereby appoint (J. K.) real representative of the said (A. B.), and do order a sale of the following lands of the said (A. B.), that is to say (*insert short description*) \_\_\_\_\_.

(*Judge's signature*), [L. S.]

Judge of the Surrogate Court  
of the County of \_\_\_\_\_.

## SCHEDULE B.

1. No person shall advance less than \$10 at any bidding under \$500, nor less than \$20 at any bidding over \$500, and no person shall retract his bidding.

2. The highest bidder shall be the purchaser, and if any dispute arise as to the last or highest bidder, the property shall be put up at a former bidding.

3. The parties to the proceedings, and the beneficiaries, with the exception of the vendor, and (naming any parties in a fiduciary situation), are to be at liberty to bid.

4. The purchaser shall, at the time of sale, pay down to the vendor, if present, and if he be not present, to his solicitor, and if he be not present, to the auctioneer, a deposit in the proportion of \$10 for every \$100 of his purchase-money, and shall pay the remainder of the purchase-money within one month from the day of sale, and upon such payment the purchaser shall be entitled to the conveyance, and to be let into possession; the purchaser shall, at the time of sale, sign an agreement for the completion of the purchase.

5. The purchaser shall have the conveyance prepared at his own expense, and tender the same for execution.

6. If the purchaser fails to comply with the conditions aforesaid, or any of them, the deposit and all other payments made thereon shall be forfeited, and the premises may be re-sold, and the deficiency, if any, occasioned by such re-sale, together with all charges at-

tending the same, or occasioned by the defaulter, shall be made good by the defaulter.

## SCHEDULE C.

In the matter of (A. B.) a deceased debtor, and of the Deceased Debtors' Lands Act, 1869, I, (C. D.) of the \_\_\_\_\_ of \_\_\_\_\_ in the County of \_\_\_\_\_, and Province of Ontario, Auctioneer, make oath and say as follows:

1. At the time and place mentioned, and under the conditions of sale in the annexed particulars and conditions of sale in this cause, I offered for sale by public auction, the lands and premises described in the said annexed particulars of sale.

2. At the said sale, J. H. bid for the said lands the sum of \_\_\_\_\_, and being the highest bidder therefor, became and was declared to be the purchaser thereof, at the price or sum of \_\_\_\_\_.

3. The said sale was conducted by me in a fair, open and proper manner, and according to the best of my skill and judgment.

## SCHEDULE D.

[Bond by real representative.]

## SCHEDULE E.

*Fees to Judge.*

For every order upon personal representative to file statements .....	\$0 50
For every order upon personal representative to attend for examination..	1 00
For every order to commit or refusing to commit personal representative..	2 00
For every order for appointment of real representative, and for sale of lands or for order that real representative take proceedings to establish right to sell, or for removing real representative..	5 00
For every order directing what persons shall be served with notice .....	0 50
For every order consolidating applications .....	0 50
Every sitting for examination before the Judge of personal representative or of witnesses per hour.....	1 00
For every advertisement for sale.....	1 00
Every duplicate for registry of order for sale under seal of the Court ....	0 50
Every order made upon application to set aside sale .....	2 00
For appearing and indorsing every conveyance to be executed by real representative.....	1 00
For every bond executed by the real representative .....	0 50
For every order not previously provided for signed by the Judge .....	0 50
For hearing application of real representative for compensation....	1 00

## SELECTIONS.

## BARON BRAMWELL'S OPINION OF TRIAL BY JURY.

The evidence given by Baron Bramwell before the Law Courts (Scotland) Commission as to trial by jury is worth attention. In answer to Mr. Shand's question, "In the majority of cases do you think that a trial before a jury or before a judge is to be preferred?" Baron Bramwell answers—"That is a very large question indeed. I think if I wanted the truth to be ascertained in that particular case, I should prefer an intelligent man who had been in the habit of exercising his faculties all his life on such questions to twelve men who had not been in the habit of exercising theirs, who might not be so intelligent men, who certainly have not been in the habit of exercising them together, farmers and others, who are very much fatigued from being taken and shut up in a hot court. If I wanted nothing but the truth in a particular case, I should prefer the verdict of the judge; and it seems to me impossible to doubt that he is the preferable tribunal. When I was first made a judge myself, I was very strongly in favour of trials being before a judge; but I am afraid that the jury is a crutch that I have been leaning on for so long a time that I have now got used to it, and I don't think I am as good a judge of the question as I was 18 years ago. Moreover, there is no doubt that trial by jury popularises the law. I remember a case before the House of Lords in which I was contending for a particular construction of a covenant, and my brother Willes was contending the other way, and the question put to me was, How was it possible that people should enter into so stringent a covenant as you contend for? I said, 'My lords, they will trust to that true court of equity, a jury, which, disregarding men's bargain and the law, will decide what is right in spite of all you say to them.' And it is so. I don't say that they do not regard the law, for I believe they do; but every man must feel that, although he may have the law on his side, he is in some peril if the justice of the case is not with him also. I think it would be difficult to discriminate between civil and criminal cases; and in criminal cases I think it is better that the judge should not be the man to find the prisoner guilty; but it is a very large question, and I feel some hesitation in offering an opinion about it."

In answer to a further question, "You have had no cause from your great experience to be dissatisfied with jury trials?" the learned baron answers—"No. There are cases in which juries go wrong; for instance, in an action against a railway company, they generally go wrong there; in actions for discharging a servant they generally go wrong; in actions by a tradesman against a gentleman

in questions whether articles supplied were necessary to an infant or wife, they are sure to go wrong; in actions as to malicious prosecution, they are always wrong. You may say to them, 'The question is not whether the man is innocent, but whether there is absence of reasonable cause and malice, but in vain. They find for the innocent man.'

In answer to Mr. Justice Willes' question—"And cases of running down?" Baron Bramwell replies—"There they generally find for the plaintiff, so much so, that a man who has run down another, if he is wise, will bring the action first. I remember one case particularly, in which the question was whether the man that recovered was free from blame, and there was blame in the other; and each recovered in the action where he was plaintiff."

—*Law Times.*

## ONTARIO REPORTS.

## COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

## DAVIS V. WELLER.

*Staying proceedings until costs of former action paid.*

An action was prosecuted to trial in name of a plaintiff, dead before the commencement of the suit, the attorney being ignorant of such fact, and the action having apparently been brought under a mistake of facts. The death of plaintiff being shewn at trial, the record was struck out by judge. An action was subsequently brought for same cause by the parties properly entitled to sue. *Held*, that this action was not vexatiously brought so as to entitle the defendant to stay proceedings in such second action until the costs of the first were paid.

(Chambers, October 16, 1869.)

An action was brought by Hosea B. Smith and William B. Smith, partners in trade, against the present defendant.

The defendant, Hosea B. Smith, died between writ and declaration, and the suit was continued in the name of William B. Smith, as surviving partner.

The case was brought down to trial at the last Lindsay Assizes, but before the jury were sworn the defendant discovered that the plaintiff, William B. Smith, had been dead for some years. The judge thereupon declined to try the cause, and struck out the record.

The instructions for this action had been given by one William R. Smith, who had some connection with the firm, and who, as was contended on the part of the plaintiff in the proceedings hereafter referred to, had acted *bona fide*, though under a mistake as to the facts or as to the names in which the suit should be brought; though it was urged on the part of the defendant that he had attempted to personate William B. Smith, taking advantage of the similarity of the names.

An action was subsequently brought by the same attorney for the same cause of action as the former suit, in the name of the now plaintiff as the representative of the said Hosea B. Smith, as surviving partner of said firm. The defendant thereupon obtained a summons calling on the plaintiff to shew cause why all proceedings should not be stayed until the costs in the former



C. L. Oham.]

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action of *Smith v. Weller* should be paid, and until security for costs should be given on the ground that the plaintiff resided in Montreal.

*W. Sydney Smith* shewed cause.

*Hector Cameron* supported the summons.

HAGARTY, C. J., C. P.—I am of opinion that the suit of *Smith v. Weller* was carried down to the Lindsay Assizes in good faith, although clearly under a mistake. At these assizes the fact of plaintiff's death was discovered. Whether after such discovery William R. Smith acted in good faith or not does not affect my judgment. The learned judge declined to try the case, and it was struck out. There was no trial on the merits, and no legal determination of the suit. I think the security for costs in that suit must be practically unavailing to defendant. The subject is much discussed in *Hoare v. Dickson*, 7 C. P. 177. Wilde, C. J., says, "When a party has brought an action and has had an opportunity of trying that action on the merits, and has either failed upon the merits, or has withdrawn his case, and afterwards brings a second action for same cause, leaving the costs of the first action unpaid, the court will interpose its authority to prevent him from so harassing his opponent." Maule, J., says, "Can you find any case where a second action has been allowed to proceed after a decision upon the merits has been had and acquiesced in?" Counsel said, "There was no decision upon the merits here, the plaintiff was nonsuited." Maule, J., "Not upon a technical objection." In fact the nonsuit was upon the merits: *Melchart v. Halsey*, 8 Wils. 149; 2 W. Bl. 741, there cited is to same effect.

The late case of *Cobbett v. Warner*, L. R. 2 Q. B. 108, I think bears upon the same distinction as to whether the merits were tried in the first action; see the judgment delivered by Mellor, J., where he discusses the nature of the nonsuit in the first action.

As I am compelled to dispose of this motion to day, I have been unable to refer to some of the authorities cited. In a note to 2 Archbold's Pr. 1298, reference is made to *Dawson v. Sampson*, 2 Chit. 146, where the proceedings in the first action were set aside for irregularity, and the court refused to stay the proceedings in a second action; see also *Livernidge v. Goode*, 2 Dowl. P. C. 141.

In *Harrison's C. L. P. Act*, 448 (1st ed.), it is said in a note, "But a limitation of the practise is, that it is only exercised in cases where the previous ejectment has been tried, and not where the plaintiff in such previous ejectment abandoned his suit before trial, because in such cases there is little vexation and very little expense." Three of the cases cited seem hardly to support this distinction. I have not had time to refer to *Doe Blackburn v. Standish*, 2 Dowl. N. S. 26, and a manuscript case of our own Courts.

I decide the case on the general view of the law in *Hoare v. Dickson*, recognized in *Cobbett v. Warner*. I do not feel warranted on the state of the authorities, so far as I have had time to examine them, to stay proceedings, as asked, till the payment of the costs of a suit, never tried nor withdrawn by act of plaintiff, nor by his attorney, determined and instituted, as I believe, in

good faith, and only becoming unavailing in consequence of a mistake which destroyed (as it were) the whole proceeding as soon as discovered.

But I think the defendant is on other grounds entitled to security for the costs of this action, and proceedings must be stayed till such is given.

At plaintiff's suggestion I allow such security to be given by deposit of fifty pounds with the Master, to remain in court to abide the event of the suit, as a security to defendant, on the usual contingencies contained in the common order for security for costs.

Order accordingly.

## MUNICIPAL CASE.

(Before His Honor JAMES R. GOWAN, Judge of the County Court of the County of Simcoe.)

### IN THE MATTER OF APPEAL FROM THE COUNTY COUNCIL OF THE COUNTY OF SIMCOE IN EQUALIZING THE ASSESSMENT ROLLS.

*Assessment Act of 1869, sec. 71—Equalization of Rolls—Procedure—Towns and Villages.*

Held, in equalizing the rolls, although a difference is recognised by 32 Vic. cap. 26, sec. 71, between town and village property and country property, that as the valuation of the former is arbitrarily reduced by two-fifths, the duty of the County Council is to increase or decrease the aggregate valuations of townships, towns, and villages, as the rolls stand, as well as to make the statutory reduction with respect to the latter—town and village rolls being subject to equalization in the same way as townships.

Statement of the mode of procedure adopted in bringing the question for consideration in this case before the Judge of the County Court under sub-sec. 8 of sec. 71. Remarks upon the difficulty, under the present system of assessment, of arriving at a fair equalization of the Assessment Rolls in different townships.

[Barrie, July 31, 1869.]

This was an appeal to the judge of the County Court of the County of Simcoe from the decision of the County Council of that County, under sec. 71 of the Assessment Act, of 1869, in equalising the assessment rolls for the preceding financial year. The facts of the case fully appear in the judgment of

GOWAN, Co. J.—Finding no procedure laid down in the law by which the jurisdiction under sec. 71 of the Assessment Act of 1869 is given, I appointed a day to hear all parties interested and settle as to the course of procedure, having reference to the nature of the jurisdiction, and the time limited for hearing.

On the day appointed, the Reeves for the greater number of municipalities were present. The Warden also was present, but not as authorized for the purpose by the County Council—Upon the appeal being lodged I stated my desire to hear the several municipalities, and that I was prepared either to hear them by counsel or by some member of the corporation, authorized to act for the body entitled to be heard, but that I could not listen to unauthorized advocacy or permit it before me. The appellants alone were represented by counsel. The Reeves appeared in person on behalf of their several municipalities. I then required the appellants to hand in at once a full and specific declaration or statement of what was objected to in the equalization by the County Council, and what it was claimed ought to have been done; in fact, full particulars to

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which they (the appellants) were to be confined in evidence, and I required similar declaration and claim from the other municipalities desiring to be heard and with the like object—these declarations were all put in—as the duty might be thrown upon me to equalize the whole assessment for the County. I further stated that I was prepared, so far as time would allow, to hear evidence submitted by any municipality to assist me to a just equalization, and I named the day when I would commence taking any evidence that might be submitted to me. In the course of the discussion as to the division of the time available for *viva voce* testimony, it was proposed to leave the matter in my hands upon the documentary evidence of a public character that I might call for, and that I was to proceed to hear and determine the matter of the appeal under the power and provisions of sub-sec. 8 of sec. 71, of the Assessment Act, it being understood that I might use my personal knowledge in such determination, and to this all the municipalities appearing assented.

The equalization made by the County Council, and the table upon which they acted, were put in evidence in the regular way and the rolls for 1868 were likewise produced, upon the call of the appellants, from the custody of the county clerk, who also subsequently furnished certain statements or abstracts from the rolls (the correctness of which I tested for myself).

No other evidence was given or tendered to me on behalf of any municipality in the county, and I have in fact been left to determine upon the same material that was or ought to have been before the County Council in making the equalization. And upon that material in the absence of any other evidence I have equalized the whole assessment of the county, and in so doing determined necessarily the specific matters appealed.

It was understood, I know, that I was not to go into the reasons why I had arrived at certain conclusions, why decided in a certain way—but simply to give judgment; yet, as I had necessarily to decide to the best of my ability the matter of law argued before me, I think it right to state the grounds which led my mind to a conclusion as to the proper construction of the law.

The assessments are made in each municipality by a local officer appointed for the purpose by the corporation of the town or township.

The work of twenty-three or more officers, each acting independently in performing a difficult duty, is not likely to present results showing a just relation between all the valuations throughout a county.

In respect to the question of value also, it is not easy to satisfy the judgment, and no two persons, I am sure, would be likely without conference or inter-communication, to arrive at similar results even upon similar material. In point of education, in soundness of judgment, and in fitness for the duty there must be a great diversity amongst the assessors.

The law not providing for the assessment for the whole county by a limited number of men, acting together and guided and governed by uniform principles, but by separate and independent valuers, it was obvious that great injustices might be wrought if every municipality was in

effect, allowed to say how much it would contribute to a county rate, and so doubtless the provision in sec. 71, was made to enable the County Council so to deal with the valuations made by individual assessors, as to make them present a just basis in apportioning a county rate.

The section referred to shows how this is to be accomplished.

*First.* The rolls for the preceding year are to be examined by the Council of the County “for the purpose of ascertaining whether the valuations made by the assessors in each township, town or village bear a just relation to the valuation so made in all such townships, towns and villages.”

*Second.* They must, according as justice may require, increase or decrease the aggregate valuations of property (of real and of personal property) in any township, town or village, by adding or deducting so much *per centum* as may in their opinion be necessary to produce a just relation between all the valuations of real and personal estate throughout the county.

This duty it is made incumbent upon County Councils to perform, and the object to be accomplished is plainly indicated, viz:—That property set down in one or more townships or towns at half or one-tenth it may be of its value,—the valuations in other towns or townships being but 10 per cent, or some other figure under actual worth—may not be allowed to so remain, but by deducting from some, or adding to others, or otherwise by levelling up or down to some one standard, all may be brought into just relations of value over the whole County. In doing this, however, there is a restriction in the latter part of the clause, That the aggregate valuation for the whole county is not to be reduced; the figuring may be increased, but is not to be brought below the sum of the aggregate values on the rolls; the just relation in value spoken of in section 71, being produced by the action of the Council as stated therein.

Sub-section 2 discriminates between town and country property, declaring as I understand it, that town property as compared with country property, shall be arbitrarily reduced to three-fifths.

I am pressed with the difficulty of reconciling the language in the first and second sub-sections. But when I look at the obvious intention of the law, I cannot think the legislature invited and directed the Councils to do that which in the next line (if the sub-section is to be construed as leaving them, the County Council, only a ministerial duty as regards towns) they are prohibited from doing.

By the first sub-section, the council are to “examine the rolls of towns, villages, and townships.” Why examine the rolls of towns, villages, and townships? Why examine the rolls of towns unless for the purpose after-mentioned? They are to see whether the valuations in the towns and villages (towns again) are in just relation to the valuations in all the towns and villages and townships in the county and they may increase or decrease the valuations in any, not a township only, but in any town, village or township adding or deducting, &c. Towns and villages are mentioned no less than four times in the clause, and in direct connection with town-

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ships, and the power of the County Council to deal with them. If it was intended that County Councils should have no power to deal with towns and villages, I cannot think the language referred to would have been used. A strong argument against the construction contended for by the appellants, lies in this, that if section 2 is to be so read as to disable Councils from doing any more towards equalization than taking the interest on the amounts at 6 per cent and capitalizing at 10 per cent as the aggregate valuation for towns, it would be in the power of the assessor of any town or village, to fix the proportion payable by his municipality on a county rate, and the County Council would be bound simply to register the wrong. I can see neither reason nor justice in allowing councils to decrease or increase the aggregate valuations of township assessors, but disabling them from doing so in the case of town assessors. I thought, at first, that a solution might be found so as to give effect to every part of the clause, in a levelling down process, in this way, taking the town with the lowest aggregate valuation and decreasing the valuations in all other municipalities, so as to produce a just relation in all the valuations; but then, this could not be done, for there is a plain and positive prohibition against reducing the aggregate valuation for the whole county as made by the assessors.

In the 3rd sub-sec. of same clause, *any local municipality* dissatisfied with the action of the Council in increasing valuation, may appeal. If the meaning of sub-sec. 2, be as contended for by the appellants, a town or village could not be affected by such a decision, but sub-sec. 8, plainly implies that they might be injuriously affected and on no other ground could the right of appeal given to them be justified.

The 72nd sec., plainly implies also that examination of the rolls of *all* municipalities is necessary in the process of equalizing the valuations in the several municipalities. For what purpose, if certain of them are to be taken at arbitrary valuations on the assessors' return! The question seems to me to answer itself.

Section 74 shows that a county rate is to be assessed equally on the whole ratable property of the County, and provides distinctly, that the amount of property returned on the rolls for the *townships*, towns and villages (as finally revised and equalized) is to be the basis upon which the apportionment is to be made, again implying the existence of the power to change the original returns.

I think to give effect to the intention of the Legislature the County Council should perform the duty in the order prescribed—first equalizing the valuations in the several municipalities, towns, townships and villages, as provided in first part of section 71—and then, after doing so, to make the deductions in respect to towns and villages directed in sub-sec. 2.

There is obviously a higher standard of value applicable to farm property than to village property, and so in the every day transactions of business it is estimated. Village property is subject to many incidents calculated to depreciate its value that property in the country is not liable to. A large share of town and village property is also perishable and in its nature

subject to yearly depreciation. The land is not in general productive except when built upon, and cannot be turned to the profitable account that farm property can. All these, it is true, enter into the element of value, and might well be considered in the first instance, but the Legislature has thought it right to fix arbitrarily a difference in value, and whether well-founded or not it must be acted upon.

The course which I think it was the duty of the County Council to follow, I myself have pursued in respect to towns. The County Judge acting in this matter of appeal is possibly invested with unrestricted power to equalize the assessment, as, in his opinion, may be just—the language is certainly broad enough to admit the view—"And such Judge shall equalize the whole assessment of the County." But I have thought it right and more in conformity with the true intention of the law, to be governed by the principle laid down in the law as to valuation respecting towns.

When this appeal was lodged I saw from the nature and extent of the enquiry, if *visa voce* testimony was to be submitted, and the short time allowed by law for making it, that it would be impossible to receive complete evidence from all interested, and evidence upon which I could with safety act, for I felt and I feel that if partial or incomplete testimony were laid before me, it would be worse than useless, and might possibly produce an impression upon my mind not calculated to assist me in arriving at a just equalization of the whole assessment of the County; nor could I have time to analyze and examine it properly, if at all. The costs, also, if the matter was gone into exhaustively, I knew would have been enormous, and these considerations and the wish expressed by all parties in the matter induced me to take it up in the way desired, and to endeavour to do justice to the best of my ability on materials submitted without insisting upon other evidence. I have endeavoured to justify the confidence placed in me, and nearly every day since the appeal was lodged I have been engaged in making, so far as time would permit, a thorough examination of all the rolls and documents before me. I cannot help saying that the manner in which many of the rolls are got up is anything but creditable to assessors. I did not think it possible that such imperfect and slovenly work as some of the rolls exhibit could have been received from the hands of any assessor. And having made a most detailed examination of what each assessor has done, I must state my conviction that assessment under the present system forms, in my judgment, a most unreliable basis of action for county or other purposes.

I will not impose upon myself the painful task of expressing an opinion as to returns of value set upon property by men whose duties are plainly set down in the Act of Parliament, and who are required to verify on oath the full certificate necessary to be placed upon their completed roll; but I will say it is small wonder that year after year the County Councils find such difficulty in agreeing on an equalization, and that the equalization, when made, is generally after a long struggle on the part of municipalities

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IN RE HENRY DAVIS ET AL. V. E. MUIR ET AL.

[L. C. Rep.]

to alter, and in the end is understood to be upon a compromise, or concession of some kind to secure the necessary majority. One can see in the probable conflict of opinion almost inevitable on the conflict of interests, in the possibility of combinations to secure results operating unjustly towards certain municipalities outside such combinations, and in other difficulties that surround the subject, suggesting obstacles to a just decision, a good reason for an appeal to some independent tribunal, beyond the reach of irregular influences; and, economy being an object, the County Judge was doubtless selected and empowered to decide, and however distasteful the duty, I must admit a right of appeal seems necessary under the present system of equalization.

For years past it would appear that no uniform course has been taken in respect to most of the municipalities in the County. I speak from a careful analysis I made of the apportionment by the County Council since 1861, exhibiting the proportion in each year both of aggregate valuations, and of the county rates in respect to each and every municipality in the County. I sought in vain for some clue therein to an apportionment, but could find none.

And now, after more than ten days of incessant labor in examining the assessment for the County and preparing tables therefrom and other work of the kind to assist me in reasoning upon the facts and figures before me, I have not entirely satisfied myself in the result arrived at, and I scarcely hope to satisfy the municipalities affected, but I know that what I have prepared approximates to a just equalized value for the whole County, and I think that whenever a reliable assessment is made of the whole County by persons acting on uniform principles and not subject to irregular influences or local direction, and with reasonable time for the work to be done, the figures I now present will, to a great extent, be justified.

In going over the work I found in the paper on which the County Council acted in equalizing many errors in addition, ranging from one dollar upwards, and in one case an error of no less than one hundred thousand dollars. These of course I set right.

The whole value for the County as equalized by me will be found increased from \$11,702,286 to \$14,809,739.86—and that is a valuation far under its real worth I incline to think, but did not consider I would be justified, as the matter stands before me, in raising it beyond the present figure.

The County Clerk, according to the direction of the Reeves, has furnished me with all the returns I called for, tabled from the public documents in his custody and he gave me some assistance in discovering where some of the errors in addition referred to were.

I believe a new rate may with facility be struck upon the figures I give, and I have spared no pains to work out all as fully in detail as is possible in minute and complex calculations.

Arrived at the close of a distasteful and very onerous duty, I have at least the consolation of knowing that the municipalities are saved a heavy outlay in the course that was taken; and as respects the payment for my labours in this

protracted enquiry there certainly is much work given for a small sum of money—eight or nine dollars being all the Government will receive in stamps as an equivalent for my services in this matter of appeal.

## LOWER CANADA REPORTS.

### INSOLVENCY CASES.

IN RE HENRY DAVIS ET AL., INSOLVENTS V. E. MUIR ET AL., CLAIMANTS.

*Held*:—That the nullity declared by paragraph 3 of section 8 of then Insolvent Act of 1864 is an absolute nullity, and a promissory note given in violation of the provisions of said paragraph is absolutely null and void *ab initio* even in the hands of a third party innocent holder before maturity.

[13 L. C. J. 184.]

This with two other similar cases, A. Milloy and M. Campbell claimants, came before the court in appeal from the award of the Assignee of the insolvent estate, James Court, rejecting the demand of the claimant, and denying his right to rank on the estate for the promissory note claimed on.

The facts of the case are as follows; About the month of June, 1867, the insolvents obtained from James Muir of Montreal, his accommodation notes in their favour for about \$12,000, he taking from them at the time the ordinary receipts showing that they were accommodation notes.

About the 10th of January, 1868, seven days before the assignment by Davis, Welsh & Co., James Muir learning that they had suspended payment, with a view to protect himself from loss, as far as possible, on the above notes which were still outstanding, obtained from them in exchange for the receipts their notes made and antedated to correspond exactly both in amounts and dates with the accommodation notes for which the receipts were given and which had been got by them from Muir in June previous.

Three of the notes thus obtained by Muir, of about \$2000 each, were transferred by him *sans recours* to the three claimants in question, viz., E. Muir, A. Milloy, and M. Campbell, who were at the time of the transfer his creditors, and as such took the notes by way of security for antecedent debt but before their apparent maturity and without any (positive) knowledge of their origin.

Shortly after the transfer of the notes by James Muir, as above, he himself became insolvent. Under these circumstances the holders of the accommodation notes got from him in June, and which were still outstanding, came in and ranked on Muir's estate as makers of the notes and on the estate of Davis, Welsh & Co., as the indorsers: and the holders of the notes got by James Muir from the insolvents in January, 1868, holding them as collateral security *sans recours* did not rank on James Muir's estate but filed their claims against the estate of the insolvents as the makers of these notes. Their right thus to rank is what was contested by the contestants in this case.

The grounds taken by the contestants were:

1. That the notes, being clearly given in violation of paragraph 3 of section 8 of the insolvent Act of 1864, were absolutely null and void *ab initio*.

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IN RE MORGAN V. WHITE ET AL.—HELMES V. LIFE INS. CO.

[U. S. Rep.]

2nd. That in any event the claimants could not be allowed to rank, as they had parted with no new consideration and incurred no new obligation on the strength of the notes, but had simply taken them as security for an antecedent debt, *causa lucrandi*, which did not constitute them holders for value as against the creditors of the estate.

The contestants cited Chitty, Bills 82, 88, 91, 94, Dorian and Macrae, 742. James' Insolvency Act of the United States, p. 158, 188.

The assignee held on both grounds that the claimants could not rank, and rejected their claims.

TORRANCE, J., without entering upon the second of these grounds, confirmed the judgment of the assignee in the three cases upon the first alone. After reading sub-section 8 of section 8, of the insolvent Act, his Honour said that as to the transaction between James Muir and Davis, Welsh & Co., there was no doubt that it was an illegal attempt to create a security upon the estate of persons then insolvent. The judgment would therefore be confirmed with costs in all three cases.

*Judgment of the assignee confirmed.*

#### IN RE CATHERINE MORGAN, INSOLVENT V. JOHN WHYTE, ET AL.

*Held*.—That the privilege of the landlord on the proceeds of the effects found on the premises leased, is not affected by the Insolvent Act of 1864, and has precedence over the privilege of the assignee and the insolvent for the costs of their respective discharges under the Act. [13 L. C. J., 187.]

In the case of Catherine Morgan, an insolvent, John Whyte, official assignee, prepared a first and final dividend sheet, in which he collocated himself for the sum of \$45, for the costs of procuring his discharge as assignee, and also collocated the insolvent for a like sum of \$45 for the costs of her discharge. The entire proceeds of the estate, with the exception of a balance of \$31 61, were absorbed by these and other expenses of winding up.

The claimant, Biron, contested this collocation, claiming that the sum of \$80, due him by the insolvent for rent, should have been collocated to him by privilege before the above mentioned two sums of \$45, and praying that the dividend sheet be set aside, and a new sheet prepared, collocating him for \$80, by privilege.

Both the assignee and the insolvent appeared by counsel and filed answers to the contestation, alleging, first, that it was not made within the six days allowed by law, and came too late; and, secondly, that the collocation of the two sums of \$45 each as a first privilege had been made in accordance with law.

The parties went to proof before the assignee. The assignee filed an admission that the proceeds of the estate were the proceeds of goods and furniture found in the premises leased by Biron to the insolvent. The clerk of the assignee was examined to prove that the charge of \$45 was the usual charge.

On the 2nd April, 1869, the assignee gave judgment both on his own claim for \$45, and on the insolvent's claim for the same sum, holding 1st, that the contestation being filed after the

expiration of the six days allowed by law, was null; 2nd, that the assignee and the insolvent were respectively entitled by law to be collocated for the sum of \$45, by privilege.

The contestant appealed from this decision.

TORRANCE, J.—The contesting creditor is the proprietor of the premises occupied by the insolvent. He has a claim for rent due, and objects to two items in the dividend sheet; 1st, the sum of \$45 for the assignee's discharge; and, 2nd, a like sum of \$45 for the insolvent's discharge. Sec. 5 of the Insolvent Act, sub-section 4, says, "in the preparation of the dividend sheet, due regard shall be had to the rank and privilege of every creditor, which rank and privilege, upon whatever they may be legally founded, shall not be disturbed by the provisions of this Act." As to the costs of the insolvent's discharge, and the costs of winding up the estate, the Act simply says, that they shall be paid out of the assets. With respect to the time of filing the contestation, it was not filed too late. The Court is therefore of opinion to reverse the judgment of the assignee, and to maintain the contestation.

The judgment is as follows:

"I the undersigned Judge, etc., having heard, etc., considering that the Insolvent Act, S. 5 S.S. 4, has declared that the rank and privilege of creditors shall not be disturbed by the provisions of said Act: considering that there is error in the dividend sheet prepared by the assignee John Whyte, of date 3rd March, 1869, inasmuch as the sum of \$45 for assignee's discharge, and the sum of \$45 for insolvent's discharge are made a first charge upon the assets of the insolvent, and before the privilege of the lessor, which privilege should have precedence, do annul and set aside said dividend sheet so far as concerns the said items, and do order that the said contestant be collocated by privilege and preference before the allowance and collocation of the said two items, with costs to the said contesting party, as well of his contestation before the said assignee as of the present appeal."

*Judgment reversed.*

## UNITED STATES REPORTS.

### SUPREME COURT, UNITED STATES.

#### HELMES V. LIFE INSURANCE CO.

A custom among life insurance companies to allow thirty days' grace for the payment of premiums, notwithstanding a clause of forfeiture for non-payment on the day they become due exists in the policy, is valid to interpret the contract, and may be proven by the insured.

Evidence that the practice of the company was to give notice of the time at which the premiums fell due, and that they omitted to do so on the occurrence of the default in question, or that they so dealt with the insured as to put her off her guard, is admissible as evidence, from which the jury may draw the conclusion that the insured was misled by the company, the company cannot take advantage of a default which they have themselves contributed to or encouraged.

Error to the District Court of Philadelphia.

Opinion by TROMPSON, C. J.

The plaintiff below offered on the trial to prove a custom among life insurance companies to allow thirty days' grace for payment of premiums due,

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even when a clause of forfeiture for non-payment at the day exists. The rejection of the offer by the court forms the first bill of exceptions and assignments of error to be considered in this case.

It might have been a difficult thing to prove such a custom, but that was not a good ground on which to refuse the offer. It was the plaintiff's right to prove it if she could, and we are to take it, for the purposes of this investigation, that she could have proved it. Would it have been effectual proof for any purpose, had it been admitted?

We think it would, although generally a contract is the law of the transaction in which it exists, and is not to be affected by anything but its terms; that is to say, it cannot be abridged or enlarged in its scope by anything else; yet there are many cases in which its execution is materially controlled by usage or custom. A familiar instance are days of grace on commercial paper. By a custom grown into law, it is not due until the expiration of three days after it purports to be; or rather the remedy is suspended against the parties for that period. So in agriculture, although the lease may fix the duration of the term, and when it is to end, yet the tenant by custom has rights on the premises after it is ended, to harvest and carry away his share of what the custom calls the way going crop. 5 Bin. 295; 2 S. & B. 14; Doug. 201; 1 Smith's Lead. Cases, 6th ed. 470. This custom seems to do more than control the remedy; it in fact delays the contract. But no custom is more perfectly established, or more completely stands on a solid foundation as law. There are customs which interpret marine contracts to the extent of apparent changes in them. In Peake's Nisi Prius 48, in the case *Charand v. Augersteen*, it was shown that by custom, a stipulation in a policy of insurance, that a vessel was to sail in October, meant that she was to sail between the 25th of the month and the 1st or 2nd of November.

While a custom as a general rule may not be heard to affect the terms of a statute, nor a contract, to the extent of delaying or abridging the force of it, it may interpret either. *Repp v. Palmer*, 3 W. 178.

The offer in this case was to control the generality of the clause of forfeiture in the policy in case of non-payment of premiums at the day, and to show that a forfeiture was not demandable at the day, nor at all, if paid within thirty days. If the plaintiff could have established this as a custom, her case would on this point have been clear of difficulty, for the testimony was that she had tendered the premium for the non-payment of which the forfeiture was claimed once and perhaps twice a month, after it was due by the terms of the policy. We do not know whether there is or is not such a custom. That is not our question at this time, the plaintiff offered to prove it, and the testimony should have been admitted in our opinion. This error is therefore sustained.

Besides this, we think there was evidence in the case for the jury on other aspects of it. If it was the practice of the company to notify the plaintiff of the times her premiums were due and payable, and they omitted it on the occasion of this default, or if they so dealt with her as to induce a belief that the clause of forfeiture would

not be insisted on in her case in case of a dereliction of payment at the day, and it was declared that the only risk she ran in not paying at the precise time was death occurring in the interval of non-payment of over-due premiums, and thus put her off her guard, they ought not to be permitted to take advantage of a default which they may themselves have encouraged. That was an aspect of the case in proof, upon which the jury should have been allowed to pass. In transactions of this nature it is easy to mislead by a practice of liberality, if followed by one of entire strictness, and the only cure for this is the enquiry by the jury whether the party has been misled by the former. If so, it is a fraud upon her rights which ought to be condemned and redressed. The cases of *Buckley v. The United States Ins. Co.*, 18 Barb. 541, and *Reese v. Insurance Co.*, 26 Barb. 556, strongly sustain this view. In this manner a course of strictness may take place, and it is not to be doubted that the Company may waive a positive compliance with the rules of insurance. 9 Casey, 397; 2 Wr. 250; 4 Ib. 311; 5 Ib. 161; 7 Ib. 250; 8 Ib. 259; 10 Ib. 323. Forfeitures are odious in law, and are only where there is the clearest evidence that that was what was meant by the stipulations of the parties. There must be no case of management or trickery to estop the party into a forfeiture. If the strictness in this case was the result of a desire to wind up business, as we learn the company did, not long thereafter, and it was adopted to avoid a return of premiums, the least which could be said of it is, that it is a most discreditable transaction. We do not know how this was. At the same time it is singular that absolute strictness should be required in paying premiums, if the company had it in contemplation to cease insuring and to return the premiums to parties who had regularly paid them, as they would be obliged to do. There is undoubtedly a comity at least extended to all insurers in regard to the matter of paying premiums. No company would be worthy to receive the countenance of the public, which should establish a practice that would for every little dereliction forfeit the policies of the insured, even if it had the power.

We think the learned judges erred in awarding a non-suit, as well as in a rejecting the proffered testimony, and that the non-suit must be set aside and a *procedendo* awarded; which is done accordingly.—*U. S. Rep.*

Once Bishop Horsley met Lord Thurlow walking with the Prince of Wales. The Bishop said he was to preach a charity sermon next Sunday, and hoped to have the honor of seeing his Royal Highness present. The Prince intimated that he would be present. Turning to Thurlow, the Bishop said, "I hope I shall also see your lordship there," "I'll be — if you do; I hear you talk nonsense enough in the House of Lords; but there I can and do contradict you, and I'll be — if I go to hear you where I can't."—*Bench and Bar.*

Lord Thurlow's appearance when presiding in the House of Lords was very grave and imposing, and Fox once remarked that it proved him dishonest, for no person could be so wise as Thurlow looked.—*Bench and Bar.*

## DIGEST OF ENGLISH LAW REPORTS—REVIEWS.

## DIGEST.

## DIGEST OF ENGLISH LAW REPORTS.

FOR NOVEMBER AND DECEMBER, 1868, AND JANUARY, FEBRUARY, MARCH, AND APRIL, 1869.

(Concluded from page 278.)

## RAILWAY.

1. A company were empowered by a statute, passed in 1832, to make and use a railway for the passage of wagons, engines, and other carriages. The company ran passenger trains drawn by locomotive steam-engines, having taken all reasonable precautions to prevent the emission of sparks. The plaintiff's haystack having been fired by sparks from an engine, *held*, that, as the company had not express powers by statute to use locomotive steam-engines, they were liable at common law for the damage.—*Jones v Festiniog Railway Co.*, Law Rep. 8 Q B. 733.

2. A railway carriage in which the plaintiffs (husband and wife) were passengers to R., on reaching R. overshot the platform on account of the length of the train. The passengers were not warned to keep their seats, nor was any offer made to back the carriage to the platform. After several persons had got out, the husband did so without any communication with the railway's servants, and the wife, standing on the steps of the carriage, took his hands and jumped down, and in so doing strained her knee. There was a foot-board between the steps and the ground which she did not use, but there was no evidence of carelessness on her part in the manner of descent. It was daylight. In an action against the railway company for the injury: *Held* (Exch. Ch. per BYLES, MELLOR, MONTAGUS SMITH, and HANNEN, JJ.; KEATING, J., *dissentiente*), that there was no evidence for the jury of negligence in the defendants, and that the plaintiffs' negligence contributed to the accident.—*Siner v. Great W. Railway Co.*, Law Rep. 4 Ex. 117. See NEGLIGENCE, 2; VENDOR'S LIEN.

## RAPE.

A woman permitted the prisoner to have connection with her, under the impression that it was her husband. *Held*, that in the absence of evidence that she was unconscious at the time the act of connection commenced, it must be taken that her consent was obtained, though by fraud, and that therefore the prisoner was not guilty of rape.—*The Queen v. Barrow*, Law Rep. 1 C. C. 156.

RECEIVER—See LUNATIO, 1.

RECORD—See EVIDENCE; PRIORITY, 2.

REFERENCE—See AWARD, 3.

REGISTRATION—See EVIDENCE; PRIORITY, 2.

RELEASE—See PRINCIPAL AND SURETY, 2.

REMAINDER—See CROSS REMAINDERS; TENANT FOR LIFE AND REMAINDER-MAN.

RES ADJUDICATA—See DIVORCE, 4.

## REVOCATION OF WILL.

The 1 Vict. c. 26, s. 22, enacts that no will which shall be in any manner revoked shall be revived by a codicil, unless the codicil "shows an intention to revive the same." Where a testator made a will, and then made a second will revoking the first, *held*, that the first will was not revived from the mere fact that a codicil subsequent to both wills imported to be a codicil "to the last will and testament of me (the testator) which bears date" the date of the first will, if there is no other evidence of intention to revive the first will.—*Goods of Steele*, Law Rep. 1 P. & D. 575.

## SALE.

1. The plaintiff, in England, sent an order to P., in Brazil, to buy cotton for him. P. bought cotton, and shipped it in the defendant's vessel; the invoice was made out as shipped on account and risk of the plaintiff, but the bill of lading was made deliverable to P.'s order or assigns. P. wrote a letter to the plaintiff, advising the shipment, saying that P. had drawn on the plaintiff for the amount in favor of P.'s agent, "to which we beg your protection." The letter purported to enclose the invoice and the bill of lading. The invoice was enclosed, but the bill of lading, indorsed in blank by P., was sent with the bill of exchange to P.'s agents in England. The agents sent the two documents to the plaintiff, who retained the bill of lading, but returned the bill of exchange unaccepted, on the ground that P. had not complied with his order. The plaintiff presented the bill of lading to the defendant, but he, being advised by P.'s agents, refused to deliver it to him, and said that he should deliver it to P.'s agents on a duplicate bill of lading. On a case stated, the court having power to draw inferences of fact: *Held*, that P.'s intention was that the property should not pass till the bill of exchange was paid, and that therefore the defendant was justified in his refusal.—*Shepherd v. Harrison*, Law Rep. 4 Q. B. 198.

2. On the 9th of May, the plaintiff, through his brokers, contracted to sell shares in a company to the defendants, stock jobbers, the set-

## DIGEST OF ENGLISH LAW REPORTS.

tling day being the 15th of May. Before the settling day the defendants, on a day called the name-day, in accordance with the custom of the stock exchange, gave to the plaintiff's broker the names of seventeen persons as ultimate purchasers. The plaintiff executed accordingly seventeen deeds of transfer, and on the settling day by his broker handed them and the share certificates to the defendants, who thereupon paid the agreed price. The company had, in the mean time, stopped payment, and was ordered wound up. The seventeen transferees had paid their purchase-money to the defendants and had received the deeds of transfer, but had not executed them, and the plaintiff was obliged to pay calls on the shares. On a bill by the plaintiff against the defendants, claiming indemnity against the calls; *Held* (reversing the decree of MALINS, V.C.), that the contract must be interpreted according to the rules of the stock exchange, and that after the defendants had paid the purchase-money, and given the names of transferees to whom the vendor executed transfers, and after these transferees had received the transfers and paid the purchase-money, the liability of the defendants ceased, and that the bill should be dismissed.—*Coles v. Bristowe*, Law Rep. 4 Ch. 8; s. p. *Grissell v. Bristowe*. (Exch. Ch., reversing judgment of the Common Pleas.) Law Rep. 4 C. P. 36 See also *Hawkins v. Maltby*, Law Rep. 4 Ch. 200.

8. But the liability of the jobber does not cease, if the person named by him as ultimate purchaser is not a person who is bound to take the shares.—*Maxted v. Paine*, Law Rep. 4 Ex. 81.

4. When persons contract to buy or sell shares through brokers and jobbers on the stock exchange, they contract according to the custom of the exchange, by which the buyer or seller of shares undertakes to buy or sell from or to the person whose name is given to him on name-day.—*Hodgkinson v. Kelly*, Law Rep. 6 Eq. 496.

5. Plaintiff, on Nov. 2, through his brokers, sold one hundred shares to the defendants, stock-jobbers. The sale-note expressed that the sale was "subject to the rules of the stock exchange, and with registration guaranteed," also that payment was to be made on Nov. 15; shortly before this date defendants sent to the plaintiff's brokers the name of H. as transferee with the purchase-money, and the transfers were executed by the plaintiff to H. The transfers not having been executed by H., the

defendants obtained a decree for specific performance by H. of the contract with them and for indemnity. Meanwhile the company had been wound up, and the plaintiff was placed on the list of contributories. He then filed this bill against the defendants for a decree for specific performance and indemnity. The plaintiff having died, his executor, having been placed on the list, revived the suit. The estate was insufficient: *Held*, (1) that the stock-jobbers were principals; (2) that the facts did not show a novation of the original contract, and that the plaintiff was entitled to the decree prayed for; (8) that the right to indemnity was not limited to the amount of dividend which the estate could pay, but that the executor had all the rights which his testator, if living, would have had.—*Cruse v. Paine*, Law Rep. 6 Eq. 641.

6. The plaintiff sold twenty shares on May 10, on the stock exchange to one P., a jobber for the settling-day, May 15. The defendant, on May 2, bought of P. twenty shares in the same company for the same day; and on May 14, having learned that the plaintiff was to supply the shares, instructed P. to give the name of C. as transferee. The transfer was made accordingly, and executed by the plaintiff and C. C. neither paid nor agreed to pay the defendant any sum in respect to the shares, and the defendant had authority to give the name of C. as transferee. The company being wound up, the plaintiff was obliged to pay calls, the liquidators refusing to register the transfer. *Held*, that the plaintiff was not entitled to be indemnified by the defendant against the calls.—*Torrington v. Lowe*, Law Rep. 4 C. P. 26.

See CUSTOM; ESTOPPEL; MORTGAGE, 3; SPECIFIC PERFORMANCE; STOPPAGE IN TRANSIT; TRUST, 8; VENDOR AND PURCHASER OF REAL ESTATE; WARRANTY.

## SEDUCTION.

The plaintiff's daughter, a minor, left his house and went into service. Her master dismissed her at a day's notice, and the next day, on her way home, the defendant seduced her. *Held*, that as soon as the service was put an end to by the master, whether rightfully or not, the girl intending to return home, the right to her services revived, and the plaintiff could maintain the action.—*Terry v. Hutchinson*, Law Rep. 8 Q. B. 599.

SENTENCE—See CRIMINAL LAW.

SERVANT—See MASTER AND SERVANT.

SET-OFF—See BILLS AND NOTES, 4.



## DIGEST OF ENGLISH LAW REPORTS.

SHERIFF—See ESCAPE.

## SHIP.

1. A charter-party provided that the ship should proceed to a certain port, and there, or as near thereto as she could safely get, deliver the cargo in the customary manner, but said nothing as to the time to be occupied in the discharge. While the ship was unloading, the authorities, owing to a threatened bombardment, refused for several days to allow any of the cargo to be unloaded. *Held*, that the contract implied by law was that each party would use reasonable diligence in performing that part of the duty of unloading which fell on him, and was not that the discharge should be completed within the time usual at the port; and that therefore the ship-owner could not recover damages from the charterer for the delay.—*Ford v. Cotesworth*, Law Rep. 4 Q. B. 127.

2. A shipper can sue in admiralty the owners of the vessel for damage to his goods caused by negligence of the crew, though the vessel was under charter, if the shipper did not know of the charter, and if the master put up the ship as a general ship.—*The Figlia Maggiore*, Law Rep. 2 Adm. & Ecc. 106.

3. The plaintiffs were indorsees of the bill of lading of a cargo, which, according to the charter-party which referred to the bill of lading, was to be unloaded at S. "at the usual place of discharge." On arriving at S. the master put into the A. dock, when the plaintiffs ordered him to remove the ship to the B. dock, which the master refused to do until he had been paid the expense of entering the A. dock. Both docks were places of delivery for similar cargoes. In a suit for breach of contract for non-delivery of cargo: *Held*, that the master was justified in mooring in the A. dock, but having received directions to move to the B. dock was bound to obey them.—*The Felix*, Law Rep. 2 Adm. & Ecc. 278.

4. The payment of a fare is necessary to constitute a "passenger" whose presence on board imposes the obligation, under the Merchant Shipping Act, 1864, s. 364, of taking a pilot.—*The Lion*, Law Rep. 2 Adm. & Ecc. 102.

See BILL OF LADING; BOTTOMRY BOND; COLLISION; DAMAGES, 2, 3; FREIGHT; INSURANCE; PRIORITY, 2; STOPPAGE IN TRANSITU; WILL, 1.

## SLANDER.

In an action for slander, a new trial will not be granted on the mere ground of insufficiency

of damages.—*Forsdike v. Stone*, Law Rep. 3 C. P. 607.

See INTERROGATORIES, 1; LIBEL.

SOLICITOR—See ATTORNEY.

## SPECIFIC PERFORMANCE.

In a suit for specific performance, a purchaser will be forced to take a title which appears to the Court of Appeal to be good, though the judge of the court below was of a different opinion; that fact not being sufficient to constitute a doubtful title.—*Brioley v. Carter*, Law Rep. 4 Ch. 230.

See COVENANT, 2; PARTNERSHIP, 1; TRUST, 3; VENDOR AND PURCHASER OF REAL ESTATE, 1.

SPIRITUALISM—See UNDUE INFLUENCE  
STAMP.

The Inland Revenue Department allowing a discount to persons purchasing a large amount of stamps, a clerk of the patents had been accustomed to buy stamps for the accommodation of the patentees, purchasing them at a discount, but charging the patentees their full value. *Held*, that he must account to the government for any profit made on stamps purchased with public moneys, but not for any profit made on stamps purchased with his own money.—*Attorney-General v. Edmunds*, Law Rep. 6 Eq. 381.

See BANKRUPTCY, 2.

## STATUTE.

A contract entered into by a company which is *ultra vires* is not ratified by references to it in subsequent local and personal acts of Parliament, not expressing any direct intention to confirm it.—*Kent Coast Railway Co. v. London, Chatham, and Dover Railway Co.*, Law Rep. 3 Ch. 656.

STATUTE OF FRAUDS—See CONTRACT.

STATUTE OF LIMITATIONS—See TENANCY IN COMMON, 2.

STOCK EXCHANGE—See CUSTOM; SALE, 2-6.

## STOPPAGE IN TRANSITU.

A., at Bahia, shipped a cargo by the order and at the risk of B., of Glasgow, in a ship chartered by A. The charter-party provided that the ship should proceed "either direct or via Falmouth, for orders to a port in Great Britain, and deliver the cargo in conformity with the bill of lading." The bill of lading stated that the ship was "bound for Falmouth for orders," and that the cargo was to be delivered "to order or its assigns." A. sent to B., the charter-party, the bill of lading, indorsed to "B. or order," and the invoice, which stated that the cargo was shipped "for the account and risk of B., for Falmouth," for

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orders and a market." The ship arrived at Falmouth, and the master, in accordance with directions from A., announced its arrival to A.'s agents, and asked them for orders. The agents applied to B. for instructions as to the destination; but before any were given B. became insolvent, and A. stopped the cargo. *Held*, that the *transitus* was not over, and that the stoppage was effectual.—*Fraser v. Will*, Law Rep. 7 Eq. 64.

## SUNDAY.

A statute provided that no licensed victualler should sell wine or ale on Sunday, except "as refreshment for travellers." A. walked on Sunday to a spa, two and a half miles from his house, for the purpose of drinking the mineral water there for the sake of his health, and was supplied with ale at a hotel at the spa. *Held*, that A. was a traveller within the exception.—*Peplow v. Richardson*, Law Rep. 4 C. P. 168.

SURETY—See PRINCIPAL AND SURETY.

SURVIVORSHIP—See VESTED INTEREST, 1.

TAIL, ESTATE IN—See DEVISE, 3; VESTED INTEREST, 2.

## TAX.

Commissioners were incorporated with powers to construct a bridge, and to borrow from the treasury £120,000 on an assignment of the tolls; they were authorized to take tolls, to be applied to pay the expenses of the bridge, and then in repayment of the sum borrowed. *Held*, that they were not liable to the poor-rate, as they were in occupation of the bridge as servants of the crown, deriving no benefit from the tolls, and were therefore exempt from the operation of 43 Eliz. c. 2, s. 1. (Exch. Ch.)—*The Queen v. McCann*, Law Rep. 8 Q. B. 677.

See INCOME TAX.

## TENANCY IN COMMON.

1. Real estate, partly agricultural land and partly a quarry, was owned in undivided shares. The quarry was worked and the agricultural land let by one of the co-owners in behalf of the rest, and the net rents and profits in general divided among the owners. In some years, however, the profits were laid out in the purchase of other lands, partly agricultural and partly used in connection with the quarry. The purchased lands were conveyed to the managing owner for the time being, and managed like the original lands. *Held*, that the share of one of the owners passed on his death intestate to his heir, and not to his representative.—*Steward v. Blakeway*, Law Rep. 6 Eq. 479.

2. Two tenants in common were entitled to property, as they supposed, in the proportion of five-ninths and four-ninths, and the rents had been received by a common agent and divided accordingly. In 1827, the supposed owner of the four-ninths settled her share, describing it as a moiety; this description was treated as an error, and the rents were received and divided as before till 1864, when it was discovered that the tenants in common were really entitled in the proportion of three-fourths to one-fourth. *Held*, that there had been an ouster of one tenant in common by the other in 1827.—*In re Peat's Trusts*, Law Rep. 7 Eq. 302.

See NEXT OF KIN, 2.

## TENANT FOR LIFE AND REMAINDER-MAN.

A tenant for life of leaseholds for years obtained, before his estate for life had come into possession, the grant of a reversionary term, to commence after the determination of the old term. He came into possession, and died, having had the estate during part of the term created by the new grant. *Held*, that the remainder-man, in respect to the fine and renewals, must pay an amount to be ascertained in reference to the actual enjoyment of the tenant for life; compound interest to be computed on the remainder-man's proportion up to the death of the tenant for life, and simple interest afterwards.—*Bradford v. Brownjohn*, Law Rep. 3 Ch. 711.

TRADES UNIONS—See INJUNCTION, 4.

TREASON—See INDICTMENT, 2.

TRESPASS—See MESSE PROFITS.

## TRUST.

1. The Court of Chancery has inherent jurisdiction in an administration suit to appoint trustees where none have been appointed by the testator.—*Dodkin v. Brunt*, Law Rep. 6 Eq. 580.

2. If persons holding funds have always dealt with them as if they were trust funds, they are liable for losses occasioned by improper investments, though they did not in fact know who the *cestuis que trust* were.—*Ex parte Norris*, Law Rep. 4 Ch. 280.

3. A married woman, one of several devisees in trust for sale, cannot bind herself to convey the estate, and a bill by the purchaser to enforce specific performance of a contract by such trustees was dismissed, but without costs, and without prejudice to any action.—*Avery v. Griffin*, Law Rep. 6 Eq. 606.

See CHARITY; CONVERSION; EXECUTOR AND ADMINISTRATOR, 2; EXECUTORY TRUST; HUSBAND AND WIFE, 1, 4.

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## ULTRA VIRES.

1. Money due to a bank on bills of exchange drawn and accepted by directors of a mining company, indorsed by the company and discounted by the bank, the proceeds of which were applied in satisfying an overdrawn account (£200) of the company with the bank, and the balance (£900) for the benefit of the company; *held* not due as on a loan within the meaning of the articles which prohibited the directors from contracting any loan beyond £500 without the consent of the shareholders. *In re Cefn Cilcen Mining Co.*, Law Rep. 7 Eq. 88.

2. A bank (A.), unauthorized to accept as security shares in another bank, except by transfer to a third person, took a transfer of shares in a bank (B.), in which they were named as transferees. This was executed not under seal, but by the signature of the manager. Bank (A.) received dividends on these shares. Bank (B.) being ordered wound up, *held*, that bank (A.) was a contributory.—*Royal Bank of India's Case*, Law Rep. 7 Eq. 91.

3. Though it be *ultra vires* in a banking company to buy shares in another company on speculation, yet it may take such shares on deposit as security, and have them transferred into its own name, and thus become subject to the liability attaching to shareholders in such company.—*Royal Bank of India's Case*, Law Rep. 4 Ch. 252.

See COMPANY, 8; STATUTE.

## UNDUE INFLUENCE.

A., a widow, aged seventy-five, within a few days after first seeing B., who claimed to be a "spiritual medium," was induced, from her belief that she was fulfilling the wishes of her deceased husband, conveyed to her through the medium of B., to adopt him as her son, and transfer £24,000 to him; to make her will in his favor; to give him a further sum of £8,000; and also to settle on him, subject to her life-interest, £80,000 (these gifts being without consideration, and without power of revocation). *Held*, that the relation existing between them implied the exercise of dominion and influence by B. over A.'s mind; and that as B. had not proved that these gifts were the pure voluntary acts of A.'s mind, they must be set aside.—*Lyon v. Home*, Law Rep. 6 Eq. 655.

USAGE—See CUSTOM; SALE, 2-6.

## VENDOR AND PURCHASER OF REAL ESTATE.

1. On a sale by order of court, the purchaser will not be compelled to take an equitable title without the legal estate being got in, except,

perhaps, where a dry legal estate is in an infant.—*Freeland v. Pearson*, Law Rep. 7 Eq. 246.

2. The plaintiff contracted to purchase of the defendant a house described in the particulars of sale as "freshold," subject to certain conditions. Condition 5 was: "That abstract of title will commence with a conveyance of April 17, 1860, and no purchaser shall investigate or take any objection in respect of the title prior to the commencement of the abstract." Condition 9 was: "If any error or misstatement shall appear to have been made in the particulars of sale, it is not to annul the sale, but shall entitle the purchaser to compensation." The abstract of the deed of April 17, 1860, recited an indenture, and also other conveyances, by which the property was conveyed to the defendant's testator in fee, subject (so far as the premises were subject thereto) to the covenants and conditions in the said indenture. The plaintiff asked further explanations of what these covenants and conditions were, which was refused. *Held*, that the plaintiff was entitled to an unincumbered freehold title, under the deed of April 17, 1860, and was therefore entitled to rescind the contract.—*Phillips v. Caldcleugh*, Law Rep. 4 Q. B. 159.

3. The owner of an estate agreed to sell it to A., representing it as containing 1,530 acres. A. agreed to sell it to a company, and part of the price was paid by them to him, £75,000 in cash, and £75,000 in bonds of the company, and A. paid the vendor £50,000 as a deposit. It appeared that the estate contained only 1,100 acres, and A. thereupon wrote to the vendor declining to complete. The company afterwards rescinded the contract, and A. brought an action against the vendor, which was compromised by repayment of the deposit and rescission of the contract. The company filed a bill against A. and some other defendants, who had agreed to share with him, for a return of the £75,000, and of the bonds. *Held*, that the bill was maintainable, that the company might rescind for misrepresentation, though they might have been able to ascertain the extent of the estate, and that they were entitled to repayment of the £75,000, and to a return of the bonds, and had a lien on a portion of the £50,000 repaid to A., which had been paid into court.

The contract provided that the estate, as to extent of acreage, should be taken to be conclusively shown by certain deeds. *Held*, that this was merely conveyancing condition as to identity, and that, coupled with the represent-

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ation as to the acreage, it did not estop the company from rescinding on the ground of deficiency of acreage.

The same relief was asked against the other defendants as against A. One made answer that the suit was improper, another that he was improperly made party. *Held*, that, if they were not necessary, they were proper parties; that no relief, in the shape of repayment, could be given against them, but that as they had not merely submitted to any order that the court should make, they would not be allowed costs (reversing the decision of *MALINS, V.C.*)—*Aberaman Ironworks v. Wickens*, Law Rep. 4 Ch. 101.

See COVENANT, 1, 2; PRIORITY, 1; SPECIFIC PERFORMANCE; TRUST, 8; VENDOR'S LIEN.

## VENDOR'S LIEN.

A vendor of land to a railway company, who have used it for their railway, is entitled to a lien on the land for the unpaid purchase-money, and to have this lien enforced by a sale, though the railroad be made and ready for traffic.—*Wing v. Tottenham and Hampstead Junction Railway Co.*, Law Rep. 8 Ch. 740.

## VESTED INTEREST.

1. Testator gave a fund on trust to pay the income to A. for life, and after the death of A., leaving issue, on trust to pay and transfer both principal and interest to the children of A., in equal shares, and if but one child, then to such child, to be paid to them, if sons, at twenty-one, and if daughters, at twenty-one or marriage, "with benefit of survivorship;" and in case there should be no children of A. at his death, or if all such children should die before twenty-one or marriage, then over. Of the five children of A., who attained twenty-one, two, B. and C., died in A.'s lifetime, while three, D., E., and F., survived him. *Held*, that B. and C. took vested interests, and that their representatives were entitled to shares with D., E., and F.—*Cornock v. Wadman*, Law Rep. 7 Eq. 80.

2. A testator gave his real and personal estate to trustees, on trust, to invest the annual proceeds of the real and personal estate during the time that any person beneficially interested in these estates should be under twenty-one, in order to accumulate the personal estate, and further to hold the whole property in trust for the first or eldest son then living of his daughter C., during his life, and after his death for his first and other sons in tail, with remainders over to C.'s other

children. The will contained a proviso that such person as should be entitled to an estate tail in possession in the real estate should not be absolutely entitled to the personal estate till he should attain twenty-one; that the personal estate should absolutely belong only to such person as should first attain twenty-one, and become entitled to an estate tail in possession in the real estate, and that in the mean time the personal estate should remain subject to the trusts declared. In 1816, Lord Eldon declared the direction to accumulate void for remoteness. At that time C. had several children. H., the eldest son, was, under the decree, entitled to, and had been in possession of, the rents and proceeds of the real and personal estate, and was still alive. His eldest son had died under twenty-one, leaving two brothers surviving, the elder of whom, E., had attained twenty-one. *Held*, that E., who was in possession of the first estate of inheritance, was, subject to his father's life-interest, absolutely entitled to the personal estate.—*Holloway v. Webber*, Law Rep. 6 Eq. 528.

See BOND, 1.

## VOLUNTARY CONVEYANCE.

A creditor under a voluntary *post obit* bond is as much entitled to the benefit of the statute of the 18 Eliz. c. 5, against fraudulent conveyances, as any other creditor.—*Adams v. Halliell*, Law Rep. 6 Eq. 468.

See FRAUDULENT CONVEYANCE.

## VOTER.

1. At the election of town councillors there were four vacancies and five candidates. B., one of the four who had a majority of votes, was returning officer, and therefore ineligible. *Held*, that mere knowledge by the electors who voted for B. that he was returning officer, did not amount to knowledge that he was disqualified in law as a candidate, and that therefore the votes were not thrown away, so as to make the election fall on the fifth candidate.—*The Queen v. Mayor of Tewkesbury*, Law Rep. 8 Q. B. 629.

2. A man cannot be convicted of personating "a person entitled to vote," if the person personated be dead at the time.—*Whitley v. Chappell*, Law Rep. 4 Q. B. 147.

## WARRANTY.

A., a manufacturer, agreed to supply to B. a quantity of shirting according to sample, each piece to weigh seven pounds. The shirtings were delivered and accepted, but it was afterwards found that the weight was made

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up by introducing into the fabric fifteen per cent. of clay, which rendered the goods unmerchantable. The presence of the clay could not be discovered by an ordinary examination of the sample. *Held*, that, had there been no sample, a warranty of merchantable quality would have been implied, that the sale by sample excluded such warranty only with respect to matters discoverable by the sample, and that an action on the implied warranty could therefore be maintained.—*Mody v. Gregson*, Law Rep. 4 Ex. 49.

**WATERCOURSE**—*See* ACTION.

**WAY**—*See* INJUNCTION, 1, 2; LANDLORD AND TENANT, 4; NEGLIGENCE, 1.

**WIFE'S EQUITY.**

A married woman is not entitled to any equity to a settlement, till her debts incurred before her marriage have been provided for.—*Barnard v. Ford*, Law Rep. 4 Ch. 247.

**WILL.**

1. A will made by a seaman serving on board a naval ship, whilst she was permanently stationed in Portsmouth harbor, is the will of a seaman "being at sea," within 1 Vict. c. 26, s. 11.—*Goods of M'Murdo*, Law Rep. 1 P. & D. 540.

2. A wrote out a will in the presence of M., read it aloud to him, and gave him a paper enclosed in an envelope, saying it was a copy of the will. On the same evening, A. wrote to M., that he had executed the will and appointed him executor. It was proved that A. executed a will about that time. The will could not be found at A.'s death. *Held*, that A.'s declarations at the time he made the will, and his letter to M., were admissible to prove its contents.—*Johnson v. Lyford*, Law Rep. 1 P. & D. 546.

3. A will contained several unattested interlineations, most of them single words, each of which was required to complete the sentence to which it belonged. They were apparently written with the same ink and at the same time as the rest of the will; but at the time of execution the body of the will was covered up by the testatrix, so that the witnesses could not see it. The court *held* that it was not bound to presume that these interlineations were made after execution, and it included them in the probate.—*Goods of Cadge*, Law Rep. 1 P. & D. 543.

4. The words in a will, "What is left, my books, and furniture, and all other things, I wish to be divided" among A., B., and C., are sufficient to carry the residue.—*Id.*

5. A testator directed that all the charitable legacies given by him should be paid out of his pure personal estate, and he gave the residue of his real and personal estate to A. The only real estate was land in Madeira, which was sold under order of the court. *Held*, that the proceeds of the Madeira estate must be considered pure personalty, and that the pure personalty was exempted from contribution towards the payment of debts, of funeral expenses, and of costs of the administration suit. *Beaumont v. Oliveira*, Law Rep. 6 Eq. 534.

6. Testator gave the income of a fund to his wife for life, on her death the fund to be divided among his "children then living or their heirs." *Held*, that the "heirs" of the children who predeceased the wife (included two who were dead at the date of the will) were entitled to share along with children who survived her; (2) that by "heirs" were meant statutory next of kin; (3) that such next of kin were to be ascertained, in the case of children, who survived the testator, at the time of the death of each child, but in the case of children who predeceased the testator, at the time of the testator's death.—*In re Philp's Will*, Law Rep. 7 Eq. 151.

7. Testator gave his real and personal estate to his son D. (a lunatic), and to D.'s mother; "she to hold all in trust for him, with power to appropriate such sums as may not be necessary for her support and his, to her other son and daughter, J. and A., but so that they are employed for their support, and not to be risked in any way that would involve the destruction of the capital. And I direct that whatever may be preserved till the death of my wife be so placed in trust that D. may always be provided for, and J. and A., both of which I appoint trustees to this my will, together with my wife, that they may have a voice in such arrangements as may be needful; but in case of bankruptcy or insolvency, they to have no power over the property beyond its legal vestment for conveyance, &c., but to depend on their mother during her life to do for them what may be proper, and after her decease to receive its income, and after their decease their heirs." The wife died before the testator. *Held*, that (subject to making a due provision for D.), J. and A. were jointly entitled to the real estate in fee and to the personal estate for life. As to who was entitled to the personal estate after the death of J. and A. *quære*.—*Herrick v. Franklin*, Law Rep. 6 Eq. 193.

## DIGEST OF ENGLISH LAW REPORTS—CORRESPONDENCE—REVIEWS—APPOINTMENTS,

See BOND; CHARITY; CONVERSION; CROSS REMAINDERS; DEVISE; ELECTION; EXECUTOR AND ADMINISTRATOR; EXECUTORY TRUST; HUSBAND AND WIFE, 8, 4; ILLEGITIMATE CHILDREN; LEGACY; MORTMAIN; NEXT OF KIN, 1; PERPETUITY; POWER, 1-3; PRINCIPAL AND SURETY, 1; REVOCATION OF WILL; TRUST, 1; VESTED INTEREST.

WITNESS—See INTERROGATORIES.

## WORDS.

"Any"—See CROSS REMAINDERS.  
 "Being at Sea"—See WILL, 1.  
 "Children"—See ILLEGITIMATE CHILDREN, 1, 2.  
 "Clerk"—See EMBEZZLEMENT.  
 "Dying without issue"—See DEVISE, 3.  
 "Heir"—See WILL, 6.  
 "Passenger"—See SHIP, 4.  
 "Personal Representative"—See NEXT OF KIN, 1.  
 "Servant"—See EMBEZZLEMENT.  
 "Traveller"—See SUNDAY.  
 "Wilful Neglect and Misconduct"—See DIVORCE, 2.

## GENERAL CORRESPONDENCE.

*Women's Rights.*

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I see from a paragraph in the *Chicago Legal News*, that a Mrs. Arabella A. Mansfield, A. B., a young married lady of about 24 years of age, was lately admitted to the bar and authorised to practice law in the State of Iowa, at the same time as her husband, Professor Mansfield.

This will gladden the eyes of John Stuart Mill; in fact, the philosopher is thrown away in benighted England, he should go to the land when the rights of married women are fully understood, and there learn a thing or two on the subject of his last hobby.

I presume the "Professor" will secure the services of his better half as a junior partner in a professional as well as in a domestic way, and I might suggest as a name for the firm "Mansfield et ux, Attorneys, &c."—this would have a legal smack about it, and at the same time be short and to the purpose. As we are told that Mrs. M. is a lady of strong mind, we trust the Professor will be able to hold his own in this complex partnership, otherwise it may result in his superintendence of the domestic department, which has hitherto

to fallen to the lot of the "*ladies*," (strange that there are no *women* in the United States, and that the men are all "Professors" or "Generals.") But really it is hardly fair to the rest of the profession in Iowa, to permit a charming fair one to pit herself against a learned brother in argument before a jury of twelve *men*. The latter would simply have no chance at all. His only possible salvation would be to have a jury composed of at least half of them, "*ladies*," if possible of twenty four years old and under.

Speaking of this suggests an idea which I have much pleasure in presenting to the learned Editors of the *Legal News*—that juries should be composed of women instead of men. Juries are so stupid now, that they cannot, humanly speaking, be any worse, and as women have a knack of often jumping to correct conclusions from wrong premises, a change in the sex would probably be highly beneficial.

Yours, &c.,

B. B.

## REVIEWS.

THE INSOLVENT ACT OF 1868, WITH TARIFF NOTES, FORMS AND A FULL INDEX, by James D. Edgar, of Osgoode Hall, Barrister-at-Law, Toronto: Copp, Clark & Co., King Street, Toronto, 1869.

Mr. Edgar and the publishers have lost no time in giving the public the benefit of this useful manual. It is in every respect an improvement of the edition of 1864, and will find a large sale. We have not space, however, to review it now, but shall return to it again hereafter.

## APPOINTMENTS TO OFFICE.

## DEPUTY CLERK OF THE CROWN, &amp;c.

JAMES CANFIELD, of the Town of Ingersoll, Esquire, to be Deputy Clerk of the Crown and Pleas, and Clerk of the County Court of the County of Oxford, in the room and stead of Wm. A. Campbell (temporarily acting), resigned. (Gazetted 16th October, 1869.)

## CORONERS.

ROBERT DOUGLAS, of the Village of Port Elgin, Esq., M.D., to be an Associate Coroner within and for the County of Bruce. (Gazetted Sept. 18th, 1869.)

WILLIAM RANDALL, of Wolfe Island, Esq., to be an Associate Coroner within and for the County of Frontenac. (Gazetted October 2nd, 1869.)

## ITEMS—To CORRESPONDENTS.

A. H. PAGET, Esq., to be an Associate Coroner within and for the County of Wellington. (Gazetted October 2nd, 1869.)

JOHN A. STEVENSON, of the Village of Norwood, Esq., M.D., to be an Associate Coroner within and for the County of Peterborough. (Gazetted October 9th, 1869.)

**THE RIBAND OATH.**—Just at this moment when there is so much plain speaking and plain writing upon the Irish land question, a perusal of the Riband Oath, may not be uninteresting to English readers. Some short time ago, a party of the Irish Constabulary made a raid upon a public-house, and in the course of a search, found the oath of which the following is a copy:—

"I (A. B.), hereby agree to become a true and loyal member of this society, and I solemnly swear before Almighty God to be true and loyal to the brotherhood, and to each member of the same; and I will be obedient to my committee and superior officers, and agree to all their articles, laws, rules, and regulations that have been since the commencement, and all amendments added thereto, and to perform all duties imposed on me with loyalty, faith, and fidelity; and I swear that neither hopes or fears, rewards or punishments, shall induce me to give evidence against any brother or brothers for any act or expression of theirs done or made collectively or individually. And, in pursuance of this obligation, I swear to aid as best I can, with purse and person, any brother or brothers who may be in distress; and I further swear to owe no allegiance to any Protestant or heretic sovereign, ruler, prince or potentate, and that I will not regard any oath delivered to me by them or their subjects, be they judge, magistrate, or else, as binding. And I swear to aid as best I can any brother or brothers who may be on trial for any act or expression of theirs, before magistrate, judge, jury, or else, and to be ready at all times to aid by every means in my power to assist in procuring his or their liberation, and, if myself a witness, to disregard any oath delivered to me on such occasions by judge, jury, magistrate, counsel, clerk, lawyer, official, or else; and that I will not regard such oath as binding. And in revenge for the sufferings of our forefathers, and protection of our rights, I further solemnly swear to aid as best I can in exterminating and extirpating all Protestants and heretics out of Ireland or elsewhere; to hunt, pursue, shoot, or destroy all Protestant or heretic landlords, proprietors, or employers; and also to hunt, shoot, pursue, and destroy all landlords or proprietors belonging to the Church of Rome should he or they evict his or their tenants from any house, land, home, or holding of theirs. And I further solemnly swear to aid as best I can in burning down, sacking, and destroying all Protestant or heretic churches or places of worship, and all houses used as such by members of different heretical denominations in this country, and to level the same to the ground.

I also solemnly swear to have no intercourse, communion or trade, neither to buy or sell, barter or exchange, give or take, or have any dealings whatever with said Protestants or heretics, unless on such occasions as cannot be avoided.

I also swear to defend the farmer, the poor man, the widow, and the orphans of any brother or former brother against the oppression of the landlords and the tyranny of Saxon laws; and I further solemnly swear to do all in my power to procure the independence of Ireland, and to aid as best I can, in allowing none but Irishmen to possess Irish land, and Ireland for the Irish.

I also solemnly swear to shoot, destroy, hunt, and pursue to death any former brother who may turn informer or traitor, or who may refuse to perform any duty ordered by his committees or superior officers, or any duty which may fall by lot or otherwise to execute. And I agree that my person shall be at all times at their service to go wherever required or do whatever sent, and also to aid by every means in my power any brother or brothers of this society executing the orders of other committees or officers belonging thereto, though not in my district; and to aid as best I can he or them in the performance of their duty.

And I most solemnly swear to keep all secrets, pass-words, signs, orders, or otherwise belonging to this society, and that I shall never divulge the same by word of mouth or otherwise; and I swear neither to mark, write, or indite with pen, pencil, stone, chalk, or any other mineral, or substance above or under wood, above or under water, above or under land, above or under air, on the sea or elsewhere, or to use therewith any substance whatever, above or under, &c., be it herb, shrub, tree, wood, liquid, mineral, or else, above or below this earth, above or under, &c., or to use therewith any liquid, marking fluid, ink, or any marking substance whatever, above or under, &c., in the sea or elsewhere, to betray or inform of any signs, secrets, passwords, orders, doings, actions, or expressions that have been, that are being, or that will be belonging to this brotherhood."—*The Law Journal*.

**CURIOUS TURNUPS.**—Midelinton, County of Oxford.—Henry Fitz William holds of our lord the King one piece of land in Midelinton, by the serjeanty\* of finding one towel to wipe the hands of our lord the King, when he shall hunt in the forest of Witchwood, in the parts of Lank-eleg, and that land was worth forty shillings.

Bray, County of Berks.—Hugh de Saint Philbert holds of our lord the King, in the town of Bray, fifty shillings of land, by the serjeanty of serving our lord the King with his boots.

Niwenton, County of Oxford.—Emma de Ham-ton holds of our lord the King, in the town of Niwenton, forty shillings of land, by the service of cutting out the linen clothes of the King and Queen.

\* Serjeanty, a service due to the King only.

## TO CORRESPONDENTS.

"A STUDENT," "STUDENT."

Letters received from above, but no names are given to verify them. We cannot, therefore, publish them under the rule which we have laid down for our guidance in such cases.

## DEATH OF THE CHANCELLOR.

## DIARY FOR DECEMBER.

1. Wed. New Trial Day C. P. Clerk of every Municipality except County to return number of Resident rate-payers to Receiver General.
2. Thur. Re-hearing Term in Chancery commence.
3. Fri.. New Trial Day, Queen's Bench.
4. SUN. 2nd Sunday in Advent.
5. Mon. Last day for notice of trial for County Courts.
12. SUN. 3rd Sunday in Advent.
14. Tues. General Sessions and County Court sittings in each County. Grammar and Common school Assessments payable. Collectors roll to be returned, unless time extended.
19. SUN. 4th Sunday in Advent.
20. Mon. Nominations of Mayors in towns, Aldermen, Reeves and Councillors, and Police Trustees.
24. Fri.. Christmas Vacation in Chancery commence.
25. Sat.. Christmas Day.
26. SUN. 1st Sunday after Christmas. St. Stephen.
27. Mon. St. John Evangelist.
27. Tues. Innocents Day.
19. Frid. School returns to be made. Last day on which remaining half G. S. fund payable. Deputy Registrar in Chancery to make returns and pay over fees.

THE

## Canada Law Journal.

DECEMBER, 1869.

## DEATH OF THE CHANCELLOR.

We again refer to this melancholy event which has deprived the country of such an able judge, and his friends and relatives of such a kind amiable companion. At the time when Mr. Van Koughnet was appointed to the Chancellorship of Upper Canada, in March, 1862, we took occasion (8 U. O. L. J., 85) to give a short sketch of his career up to that time, it is therefore unnecessary to repeat what may there be found.

Whilst at the Bar, Mr. Van Koughnet was remarkable for the quickness and keenness of his perceptive faculties, enabling him to ascertain the strong points of his own, and the weak ones of his adversary's case, with wonderful rapidity. In examining a witness he is said not to have had an equal. On the Bench, though very ingenuous and open to conviction, his mind was rapidly made up, and he much more generally than the other judges decided cases on the spot, not feeling in his own mind the necessity of further consideration of evidence of which his quickness enabled him at once to comprehend the full bearing. It was a pleasure to conduct cases before one so fair, courteous and considerate; and here we may remark, that the courtesy and patience of the Chancellor was not confined to himself, but is a pleasing attribute

of both of his learned brethren on the Equity Bench.

Upon his impartiality and uprightness as a judge we deem it unnecessary to dilate; the character of the Bench of Upper Canada in this respect has always stood so high, that it is sufficient to say, that he was the fitting chief of a court of "equity and good conscience."

He lent a helping to many reforms in the administration of the Court of Chancery, simplifying the procedure, and facilitating business, and was the author of the system of having the arguments of counsel immediately after the examination of the witnesses.

But, when speaking of him in his judicial capacity, we cannot do better than quote the words of Mr. Vice-Chancellor Mowat, who was holding circuit at Cobourg, when the news of the Chancellor's death arrived there:—

"As a judge, he was most conscientious; he had a profound love of justice, and an exalted sense of judicial duty. In the discharge of his office, he acted without fear, favor, or affection, if any judge ever did. He was from the first prompt in deciding, and that he was generally accurate as well as prompt is shown by the fact that his decrees were generally (I believe), as seldom appealed from successfully as those of any judge we ever had. He had long been suffering from ill-health, but he was never willing to allow us to relieve him from any of his work, and he often insisted on doing his full share when he was ill able to endure the fatigue which it occasioned him. He had completed his last circuit without assistance, but a few days before his sad death. A Conservative by birth, education, and party connections, in his court he was a Reformer. He did not a little to complete those ameliorations in the practice of the Court of Chancery, which were commenced under the auspices of his distinguished predecessor, Chancellor Blake,—of whose able services, ill health so soon deprived the country, but who, though ever since unable to take part in public duty, still lives, and will, I hope, long live to be a comfort to his family and friends. Chancellor Van Koughnet originated valuable reforms himself, and always listened with interest to those suggested by others. I believe that he was the author of the present practice of hearing the arguments at these Circuit Courts, and of disposing of the cases at once, wherever practicable, a practice by which business has been greatly expedited, the expense of suits much diminished, and a knowledge of the doctrines of



## DEATH OF THE CHANCELLOR.

equity diffused amongst the people—all objects, I need not say, of great public moment."

Personally, the late Chancellor was very generally liked; more so, perhaps, than any other man of his day. Without seeking popularity, he was essentially popular, for none could resist his unaffected good humour, charm of manner, and evident warmth of heart. Mr. Vice-Chancellor Spragge at the opening of Court after the event, spoke in the most feeling manner of his death; and we are sorry we can only give the substance of his remarks:—

"Since I last met you, gentlemen of the Bar, an event has occurred, a most sad and unexpected one, which we all, the Bench and the Bar alike, most deeply deplore. The learned and able man, who for the past seven years has presided as its chief Judge, has passed away from amongst us, in the very prime of life, when, according to the ordinary course of nature, many years of honourable usefulness lay before him.

"The late Chancellor, let me add our late friend, for he was the warm and sincere friend of all of us, possessed many admirable qualities. With talents of a very high order, he combined one of the kindest natures that it has ever been my lot to meet with; and he discharged, with rare ability and the purest integrity, the duties of his high office. We have lost an able and upright Judge, and a man as beloved as he was respected. The country and the Judiciary, and in an especial manner this Court have much to deplore in the loss of such a man.

"He is dead, and we shall see his face no more, but his memory will long be held by all of us in affectionate remembrance."

And Mr. Mowat, on the occasion already alluded to, further said:—

"He was, indeed, one of the most amiable of men; he had a warm and tender heart, and his friendship was deep and never failing. I never knew any one who had in him more to attract and less to repel. He probably never had a personal enemy. \* \* \* During the period that he was engaged in politics, he was not only successful in obtaining and keeping the confidence of his political supporters, but he soon secured and he ever afterwards retained the personal friendship of, I believe, every one of his opponents in the House. Whatever those opposed to him, politically, may have thought of the measures or proceedings of the government of which he formed part, nobody doubted the purity of his motives or the soundness of his patriotism. He loved this Canada of ours, which was the land of his birth, and he

earnestly desired to promote its interests. \* \* \* Few men will die leaving more friends to mourn his loss. Speaking for myself and for you, gentlemen of the Bar, I am sure that I may say, that we loved him very dearly, and that we mourn him very deeply, sorrowing greatly to remember that we are never again to press his hand, or hear his kindly voice."

The day before the funeral, a meeting of the Bar was called, in the Library of Osgoode Hall, to express the feelings of the profession on the melancholy occasion, and their sympathy with the members of his family in their bereavement. The Attorney-General of Ontario, having introduced the subject in a few appropriate remarks, the following resolutions were passed:—

"*Resolved*.—1. That the Bar of Ontario desire to express their unfeigned grief at, and deep sense of the loss sustained by the Profession in the death of the late lamented the Hon. P. M. M. S. Van Koughnet, Chancellor of this Province.

"2. That the Bar attend the funeral of the late Chancellor in their robes, as a mark of respect to the deceased.

"3. That a copy of the foregoing resolutions be furnished to the Treasurer of the Law Society [absent from Toronto at the time], with a request that they may be entered on the books of the Society, and, that he be requested to call a meeting of the Bar for to-morrow, at two o'clock, at Osgoode Hall, to attend in a body the funeral of our late Chancellor."

The funeral was largely attended by all classes, and amongst them might be seen many of the clerks who were under him when Commissioner of Crown Lands, by all of whom he is held in affectionate remembrance. The Pall-bearers were Hon. W. H. Draper, C. B., Chief Justice of the Court of Appeal, the Chief Justice of Ontario, Chief Justice Hagarty, Vice-Chancellors Spragge and Mowat, Judges Morrison, Wilson, Gwynne, and Galt, and Judge Duggan. The body was interred in St. James' Cemetery.

His name will be remembered in the history of Canada as that of a man endowed with a very high order of intellect, as an eloquent and effective speaker; both at the Bar and in Parliament; as an able administrator, shewn as well in the management of the Crown Lands Department, as in the reforms in the Court of Chancery; and, to crown all, a man with as kindly a heart as ever made a friend or disarmed an enemy.

## COMMON LAW CHAMBERS ACT.

## COMMON LAW CHAMBERS.

At last something has been done to facilitate business in Chambers, and to remedy to a certain extent that inconvenience to the profession and loss to the public, which we have referred to as often occurring. It is proper to be thankful for small mercies, but the expedient that has been adopted cannot be looked upon otherwise than in the light of a temporary relief, unless it be intended hereafter to make the appointment of Clerks of the Crown of the Queen's Bench with reference to the duties that will devolve upon them under this act.

The thought of using the material now available in Osgoode Hall would, in all probability, never have occurred, but from the fact that the present Clerk of the Queen's Bench is in many respects admirably qualified for the position he must now occasionally occupy. Mr. Dalton is of long and good standing at the Bar; a Queen's Counsel (in matters of arbitration probably he knows more than any other man in the Province), and though at present not as familiar with the details of practice, as he soon will be, he is well up in pleading; a sound lawyer; a gentleman of courteous manners, with a judicial mind, proved by his success as an arbitrator, and commands the respect of those who are brought in contact with him. It is fortunate we can truly say all this, but, at the same time, the true remedy was the appointment of another judge, either simply to hold Practice Court and Chambers, or else to sit with the other judges as occasion might require, or as might be arranged—in fact, becoming one of them, and all taking Chambers in rotation, as has been the practice hitherto, but of course, so arranging the business that one judge should always be free to attend to the work in Chambers.

The first plan is objected to, as it is thought by many, including some of the judges, that it is advisable for the judges occasionally to sit in Chambers so as to keep themselves up in practice; while others think it a waste of the judges time, and that there would be more uniformity in decisions, and that the practice would be more settled by adopting the former suggestion. We incline to think that it would be of doubtful expedience to take the latter course, and for other reasons besides that above mentioned; for example, by the present system we, in effect,

get the benefit of the views and arguments of many judges, in place of one, on the same or similar points, and we must confess to a theory, not very clearly defined, certainly, that a more extended sphere than the routine of Chambers practice is required to enable a person to adjudicate satisfactorily upon the multitudinous variety of cases that go there for decision, many of them of great importance and difficulty.

We do not know to what extent the judges intend to avail themselves of Mr. Dalton's services under this act. Of course they will do so during the sittings of the York Assizes, and when the judges are unavoidably absent, &c.; if, also, in Term time, some assistance would probably be necessary in the Queen's Bench office. We have no doubt we shall soon learn from the authoritative source all about it.

The judges have, under this Act, power to regulate the scale of costs to be adopted in Chambers practice. We trust they will act liberally in this respect and allow fees to counsel which will be worth charging, and proportioned to the labour bestowed upon the case. It is scarcely fair that a Barrister should be asked to lose half a day and argue a case for the *honorarium* of 25c., or that his country principal should have to pay the difference between this 25c. and such fee as his agent may reasonably charge out of his own pocket, for it often has to come to that in the end.

## COMMON LAW CHAMBERS ACT:

The following is the Act already spoken of, as it stood after being amended in committee:

Whereas it is expedient to make provision for proceedings in Judges' Chambers in the Superior Courts of Common Law: Therefore, Her Majesty, etc., enacts as follows:—

1. Any person acting as judge of assize and *nisi prius*, in the city of Toronto, whether for the business of the county of York, or for the city of Toronto, shall, while so sitting or acting as such judge, or while the sittings shall last, be enabled to act as a judge in chambers in all matters, as if he were a judge of one of the superior courts of common law.

2. Any person acting as a judge of assize and *nisi prius* shall, in and for the county for which he is acting, and while the sittings of the said court shall last, be enabled to act as a judge in chambers in all matters entered for trial before him, as if he were a judge of one of the said superior courts.

## COMMON LAW CHAMBERS ACT—SHALL WE PUNISH MURDER.

3. Every judge of the said superior courts is hereby authorized to transact such business at chambers or elsewhere depending in either of the said superior courts, as relates to matters over which said courts have a common jurisdiction and as may according to the course and practice of the court be transacted by a single judge.

4. Every judge of the superior courts is hereby authorized to transact out of court such business as may, according to the course and practice of the court, be so transacted by a single judge, relating to any suit or proceeding in either of the said Courts of Queen's Bench or Common Pleas, or relating to the granting writs of *certiorari* or *habeas corpus*, or to the admitting of persons on criminal charges to bail, or approving of bonds with sureties when given in any matter of appeal from the judgment of either of the said courts, or to the issuing of extents or other process for the recovery of debts due to Her Majesty, or relating to any other matter or thing usually transacted out of court, in like manner as if the judge transacting such business had been a judge of the court to which the same by law belongs.

5. Whereas a great part of the business in the chambers of the said judges might with advantage to the public, be disposed of by the clerks of the Crown and Pleas of the said Court of Queen's Bench, be it enacted, that it shall be lawful for a majority of all the judges of the said courts, which majority shall include the two Chief Justices, or one of the Chief Justices, and the senior of the Puisne Judges of the said courts, from time to time, to make and publish general rules for the following purposes, that is to say :

(1). For empowering the clerks of the Crown of the said courts of Queen's Bench to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same as by virtue of any statute or custom, or by the rules of practice of the said respective courts or any of them respectively are now done, transacted or exercised by a judge of the said respective courts sitting at chambers, and as shall be specified in any such rule, except in respect of matters relating to the liberty of the subject.

(2). For regulating the attendance of the said clerks at chambers, the course of practice to be there pursued, and the scale of costs to be there adopted.

(3). For fixing the table of fees to be taken in respect of business to be transacted before the said clerks of the Crown at chambers, and for abolishing or altering from time to time such table of fees.

6. Every rule to be made under this Act shall be read aloud in open court—in each of said courts, ten clear days at least before the day fixed for such rule coming into operation, and within one month after that day a copy

of every such rule shall be transmitted by one of the said Chief Justices to the Provincial Secretary.

7. Every rule to be made under this Act shall be laid before the Legislative Assembly by the Provincial Secretary, within one month after the making thereof, if the Legislature be then sitting, or if not, then within one month after the commencement of the next session of the Legislature.

8. Every order or decision made or given under this Act by the said clerk of the Crown sitting at chambers, shall be as valid and binding on all parties concerned, as if the same had been made or given by a judge sitting at chambers; provided always that it shall be lawful for any person affected by any order or decision of the said clerk of the Crown forthwith, or within such time as shall be appointed by any rules to be made under this Act, and subject to such conditions as to costs, as may be provided under any such rules or orders to appeal from such decision to a judge sitting at chambers.

The Bill which was introduced by Mr. Clarke, to change the mode of appointing the Benchers by making them elective, has been withdrawn, the Speaker having ruled that it was a private Bill. It is a subject of great importance, and not to be dealt with without full and careful consideration, and therefore, beside all the objections on the face of the Bill itself, we are glad that it was thrown out. We shall have something to say on this subject hereafter.

Mr. Spragge has been offered and has accepted the Chancellorship, and that Mr. Strong has been appointed one of the Vice-Chancellors.

## SELECTIONS.

## SHALL WE PUNISH MURDER ?

The crime of murder is an atrocious one. For one human being, deliberately, with studied purpose and malice afore-thought, to take the life of another, is an act at the bare thought of which even many a hardened wretch shudders. That there should be circumstances, under whose cover a murderer may not only be excused, but also justified; not only justified, but even glorified, is at first thought almost inconceivable; nevertheless, such circumstances exist.

Woman in America occupies an anomalous condition. Treated in some respects as if far superior to the masculine sex, in others denied all participation in rights and privileges accorded to its lowest specimens, her outward conduct is a fit and faithful representation of the

## SHALL WE PUNISH MURDER.

inconsistencies of her position. This is the only country in the world in which a woman who has murdered her seducer, is honorably acquitted by a jury, and in which a husband can with impunity take the life of his wife's paramour. Why the perpetration of an act, to which the woman alleged to be injured thereby has given her full consent, should exempt her from being punished according to law for any crime she may commit, it is impossible to understand; unless she commit the crime in self-defence, or be regarded and treated as an irresponsible being, possessing and exercising no will or discretion of her own, and a completely passive instrument in the hands of others. Both of these suppositions are untenable. In watching for a man and shooting him unawares, she, far from acting on the defensive, is acting very offensively, and no one will for a moment maintain the latter supposition, and assert, that women have no wills of their own.

What are the arguments commonly adduced in support of the barbarous practices above named? Great stress is always laid upon the unsuspecting innocence of the deceived, the base designs of the deceiver, and the social stigma which his villainy casts upon her. That in this case, as in every other, it takes two to make a bargain, is a fact perpetually lost sight of. To say that every seducer is an unprincipled villian, whose arts it is impossible for weak women to resist, is to say something of which every one of us knows to be absurd. Taking the strongest possible case, that of a young woman seduced under promise of marriage, what are the facts? Overcome by her passions, trusting in his promises, although conscious that by yielding to his premature solicitations she cannot but compromise herself in his eyes, she falls from her high estate. The man deserts her, and the usual consequences follow. Who is to blame? The man only? Is she to be in no wise responsible for her rash and inconsiderate conduct?

But the plea most frequently urged in behalf of the murderess is the enormity of the punishment with which society visits her transgression against chastity, and the slight censure it passes upon him in concert with whom she transgresses. To state this plea is to refute it. If in leaving the path of virtue a young woman has committed an offence, in the estimation of society, for which she deserves to be excluded from its precincts, then society can not, if it desire to remain consistent, sanction the murder by her of a man whom it regards in no very reprehensible light. On the contrary, a man known to be successful with the opposite sex, is generally regarded by his fellows as a lucky dog; his success, far from rendering him odious in their eyes, is envied by them; and the women themselves, in many cases, feel much more flattered than repelled by the attentions of a man, whom they know to have achieved success with so many of them. If we really regarded a seducer as a scoundrel

we would treat him as one. This, however, we do not. In considering his capacities for an office, it does not occur to us to inquire whether these are effected by his fancied rascality; in introducing him into society, and in generally treating him as we do other men, we also contrive to overlook it. And yet after his violent death we say "served him right," and acquit and applaud the murderess. The question here is not whether he ought to be treated as a scoundrel, but whether he is. If he is not, then, without being so grossly inconsistent as to make our judgment go for nought, we cannot consider his conduct after his death differently from what we did before it.

It may, however, be asked what a woman accomplishes by murdering her seducer. It is difficult to understand what motive impels her to the deed, unless it be the ignoble passion of revenge. She can obtain civil redress from every tribunal in the land; there is not a jury which would not award her heavy damages. But with these she is not satisfied; they do not appease her thirst for revenge. She wants that which public opinion and therefore the law does not give her, the death of her seducer. Not that it does her any good to kill him. She does not thereby restore her shattered reputation; the doors of society remain closed against her. Enraged at beholding what different results the same indiscretion brings about to her and to him, she concludes that the best mode of wreaking her revenge is to take his life. She, whose offence against society consisted in illegally giving birth to one being, now atones for it by illegally destroying another.

A fugitive allusion has been made to the case of the husband killing his wife's paramour. All that has hitherto been said applies with double force to him. That a husband, who, as has repeatedly happened, in cold blood, has shot down the supposed destroyer of his peace, should, as has also repeatedly happened, be allowed to go unpunished for his crime, is a spectacle at which we may well stand aghast. We venture to assert that no instance of conjugal infidelity on the part of the wife has ever happened in this country, in which she was not fully as culpable as he with whom she sinned. No married woman can ever be approached by one harboring evil designs against her honor without her becoming aware of them before it is too late; no man can ever cause her to prove faithless to her husband, unless it be with her full consent. What grounds of justification, then, has the husband who deliberately shoots her paramour? The honor of his family, it is said, has been invaded; does he by his bloody deed restore it? The purity of his wife has been defiled; does he wash the stain away? Indeed, no injury has been done him; he simply ascertains that he has been mistaken in his wife; she, whom he thought virtuous, is shown to be otherwise. Is he to be justified in killing a man, because of a mistake which he himself has made,

## SHALL WE PUNISH MURDER.

To take the life of any human being, except in self-defence or when the law commands it, is illegal. That the laws of any country conform in the main to its public opinion is a threadbare truth. We have no law punishing seduction with death, simply because we don't want it. To the passage of any such law, public opinion would be overwhelmingly opposed. But we have a law punishing murder. Then why not apply it to a case falling within it? Why not teach our young women to be on their guard against designing men, and discourage them from committing that awful crime, murder? One of the most pernicious consequences of the acquittal of this class of murderesses is the direct encouragement it gives to others to commit murder under similar circumstances. Recently, in Maryland, a woman was made a heroine of for having twice in succession shot her lover, who did not marry her because, being the only support of a mother and several sisters, he could not. A premium is thus set on deliberate, cowardly homicide. But this is not all. The murdered person may have had good and substantial reasons for refusing to keep his promise of marriage. All these, however, are buried with him; every opportunity to present them, to explain his conduct, to show that the murderess, in her double role as judge and executioner, acted unjustifiably, inexcusably, is gone; for at her trial the public prosecutor is confined to proving the naked fact of the murder, and is not allowed to invalidate or weaken what is called the defence by submitting to the jury any evidence in explanation or extenuation of the murdered man's conduct. The value of human life, already so frightfully low in this country, is in this way lowered still more.

The inconsistencies of public opinion have already been pointed out. Although a man, known to be a seducer, is treated none the worse for this, and has the same access to society as anybody else, yet his violent death elicits applause, or at least no condemnation. Although a proposition to make seduction legally punishable with death would not have the least prospect of being adopted by any legislature, yet when a woman in violation of the law kills her seducer, thus doing that illegally which no one is willing to make legal, no voice is heard in reprobation of the outrage. Such a remarkable phenomenon calls for an explanation, for which, in the case of the husband killing his wife's paramour, we need not be at a loss. The only supposition, upon which his act could possibly be excused, is the very one upon which, in matters relating to husband and wife, the common law has always proceeded, viz.: that the wife has no will or mind of her own, and that, therefore, the paramour is the only person to whom any blame or guilt attaches. That husband and wife are but one person, has always been a maxim of the common law, by which, however, is practically meant that the husband is the one person. The wife, being supposed to be

always acting under the coercion of her husband, has no power to contract; her agreements are of no effect whatever; she can not even commit a crime in his presence, save in a few excepted cases. In fact so much is she regarded as under his control that he has the right, solemnly confirmed by an English court of justice a few years ago, to chastise her corporally whenever he thinks it necessary. There can be no doubt that the above quoted maxim took its rise in the same modes of thought and action which, prevailing universally seven or eight hundred years ago, gave birth to the system of law denominated the common. At that period, and indeed long thereafter, this maxim was living law, in perfect consonance with the semi-civilization to which the English had attained. Although in the course of time opinions have greatly changed, so that in this country, at least, the husband can no longer enjoy the privilege of whipping his wife, without having to pay dearly therefor, yet in other respects there has been but little advance; venerable traditions fetters the minds of men, and, unbeknown to them, warp their judgments; and the husband is still looked upon as, to some extent, the owner of his family whose honor he is required to guard. The absurd notion of duellists, that the infliction of a bodily wound cures a mental one, is among sensible people happily exploded, but the parallel notion of husbands, similarly dating back to, and transmitted from the middle ages, that by killing their wives' paramours they repair their lacerated honour, is received with applause. It is only when juries will cease regarding the husband as the owner of his family, and will cease divesting the wife of those qualities of free will and responsible action with which she is naturally endowed, that they will also cease acquitting the man, who, after having deliberately satisfied himself of his wife's guilt, deliberately kills her accomplice.

In the case also of the murder of the seducer by the seduced, the woman is either habitually regarded as having no will, or else it is considered as overcome by the insidious wiles of the seducer. That he also has strong, frequently ungovernable passions, is a consideration always overlooked; he is constantly represented as the smooth, calm, scheming villain, who effects her ruin with undisturbed placidity. An additional element, however, enters into this case, viz.: the dim, vague consciousness under which juries, and indeed all of us, labor, that the relations between the sexes are not what they should be, that the one is oppressed and occupies a subordinate position to the other. We do not here refer to the political disabilities of woman, but only to the social inequalities and prejudices from which she suffers. Though our confidence may be strong that the time is near at hand when no one will any longer presume to dictate to woman her supposed peculiar sphere, yet at the present moment that time has not come, and it is in

## SHALL WE PUNISH MURDER—REPAYMENT OF MORTGAGE MONEY, &amp;c.

consequence of perceiving this that our sympathies are always so copiously excited in her favor. We are passing through a transition period in which some women, bolder than the rest, defy and shatter old prejudices by following occupations for merely aspiring to which they in bygone times would have been ostracised. Hence the social oppression of the entire sex is forced upon the attention of the public mind, which, by a beautiful provision of nature, immediately seeks to re-establish an equilibrium by causing an increased gallantry, sympathy and devotion to be shown them as a temporary substitute for that freedom of action of which they have always been deprived. In other countries, where this transition period has not yet set in, a woman killing her seducer is punished like any other murderess, because she is looked upon as a responsible being, and because the public mind, not having become aware of the disadvantages of position incident to her sex, has not yet begun to sympathize with her on account of them. A removal of these disadvantages will operate in the same way as a failure to perceive them. Thus with us, as soon as woman will be at full liberty, both socially and politically, to follow whatever occupation she chooses, as soon as the prejudices are dispated which now debar her from devoting her energies to many a field of action, as soon as she is placed on a footing of perfect equality in every respect with man, who will then of himself demand that, having the same rights with him, she should be held equally responsible for their use or abuse, then, but not before, all motives for bestowing any extra amount of sympathy upon her, will vanish; her crimes will be judged as severely and impartially as those of man, and juries will no longer deliver verdicts which, unconsciously prompted by a general appreciation of her depressed condition, work injustice in each particular case.—*Bench and Bar*.

REPAYMENT OF MORTGAGE MONEY.  
TRANSFER WITHOUT NOTICE.

*Whittington v. Tate, L.C., 17 W. R. 559.*

It is well settled that when a mortgagee assigns the mortgage and notice is not given to the mortgagor, the assignee is subject to all the equities between the mortgagor and the original mortgagee. Thus, if the mortgagor were to pay off the debt to his original mortgagee that would be a good payment as against the assignee. The principle has been carried to the length of affecting the transferee by the balance of a general account between the mortgagor and original mortgagee: *vide Norrish v. Marshall* (5 Madd. 481), where the mortgagor claiming that he had extinguished the mortgage-debt by wines and money supplied to the plaintiff, the Vice-Chancellor of England decreed an account, observing that, "as against an assignee without notice the mortgagor has

the same right as he has against the mortgagee, and whatever he can claim in the way of mutual credit as against the mortgagee he can claim equally against the assignee. In *Ex parte Monro, Re Frazer* (Buck, 300), a bond having been assigned without notice to the obligor, the debt was held to be still in the order and disposition of the obligee within 21 Jac. 1, c. 19. *Williams v. Sorrell* (4 Ves. 390) affords an example of the simple case. There the mortgage having been assigned without notice to the mortgagor, a payment afterwards made by the mortgagor to the original mortgagee was held a valid payment as against the assignee, and on a foreclosure bill filed by the assignee, the mortgagor tendering the balance, which tender was refused, the mortgagor was required to pay costs to the time of tender only. *Matthews v. Wallwyn* (4 Ves. 118) is another case in which this principle is clearly ruled and explained.

Upon the consideration—what is notice? it is worthy of observation that in *Lloyd v. Banks* (16 W. R. 988) Lord Cairns held that any actual knowledge on the part of the person to be affected is notice, provided the knowledge were such as would operate on the mind of a reasonable man of business. In *Dearle v. Hall* (3 Russ. 1) and *Foster v. Cockerell* (3 Cl. & F. 456), and the cases above that date, the question of notice seems to have been regarded as being not so much whether or no there had been actual knowledge as a question of the conduct of the incumbrancer. But the decision in *Lloyd v. Banks*, by treating actual knowledge, by whomsoever or howsoever conveyed, as the thing to be looked for, puts the matter upon rather a different footing.

In the principal case, without at all controverting the principle of *Matthews v. Wallwyn*, *Williams v. Sorrell*, &c., a payment made by the mortgagor, after an assignment of the mortgage without notice to himself, was held to have been made in his own wrong. The case, which was a very unfortunate one, arose out of the defalcations of a Liverpool solicitor named Stockley, who absconded in the latter end of 1867. The defaulter was the solicitor both of the original mortgagor and of the transferee. He gave no notice to the mortgagor. The transferee left the deeds in his custody. As between himself and the mortgagor, the solicitor had authority to receive the interest on behalf of the mortgagee, but had no authority to receive the principal. The mortgagor wishing to pay off the mortgage, the solicitor got the transferee to execute a conveyance under the impression that he was merely joining in an appointment of new trustees (the mortgaged property being trust property); he handed this deed to the mortgagor with all the other deeds (except the transfer), but he kept the money himself, merely paying the transferee from time to time the interest on the original mortgage-money. Three years afterwards the transferee filed a foreclosure bill against the astonished mortgagors, and

## BANKERS AS GRATUITOUS BAILEES.

Lord Hatherley, affirming the Master of the Rolls, held that the mortgagee must pay his principal a second time or be foreclosed. The first payment was held to have been in his own wrong, because he made it to a person who was not authorised to receive it; if he had gone with his money to his original mortgagee, the original mortgagee would have said, "The mortgage is transferred," and passed him on to the transferee, and so the payment would have got into the right hands. But if the original mortgagee had played the knave and pocketed the money, the fault would have been the transferee's, for not giving to the mortgagor notice of his having taken the transfer.

The case was a particularly hard one upon the mortgagor, because, receiving back his deeds, his mortgage, with a re conveyance, he had everything to assure him that the mortgage was extinguished. Yet the decision is unimpeachable. If, when the mortgage was created, the mortgagor had from the mortgagee been given to understand that the solicitor had authority to receive principal as well as interest, here, we imagine, the transferee, not having given notice, would have been bound by this arrangement, and the payment made would have been good as against him. The moral of the case is—that mortgagors should, unless they have a special authority, take care, in paying off their mortgages, to pay direct to the mortgagor, and not to the solicitor through whom the advance was effected.—*Solicitors' Journal*.

## BANKERS AS GRATUITOUS BAILEES.

Since the days of Chief Justice Holt the subject of bailments has probably never been so elaborately dealt with as in the case of *Giblin v. McMullen*, in the Privy Council\*, a most important case as affecting the relationship between bankers and their customers.

The facts were, that a customer of the Union Bank of Australia entrusted to it certain railway debentures. These debentures were placed in the ordinary depository, but they were extracted by a dishonest cashier, and converted to his own purposes. The jury, at the trial found a verdict against the bankers for the full value of the securities. A rule was made absolute to set aside the verdict, and from this decision of the colonial court, an appeal was made to the Privy Council which upheld the decision.

The bankers being gratuitous bailees, the question really turned on the meaning to be given to the term "gross negligence." It was contended by the Solicitor-General on behalf of the appellant that the question of negligence being one of fact, had been properly left to the jury, whose finding ought not to be disturbed. The negligence alleged against the bank was in allowing the cashier access alone to the strong room, and in not employing an honest person as cashier, and it was contended that

although the individual had been long in the employ of the bank, the fact that a gentleman from England had called on the manager and told him that he had expected to receive money from the cashier, and had not received it, was such a notification as ought to have put the bank on its guard, and consequently that they were guilty of gross negligence in the keeping of the securities.

On the other hand, it was argued that if the question whether bankers have taken proper care of the securities of their customers is to be left to the jury, no banker would accept such a liability without reward, and that the negligence to make the respondents liable must be wilful negligence, which would be near to fraud. We will first see what the Privy Council say as to gross negligence. Upon this the dictum of Lord Cranworth in *Bond v. The South Devon Railway Company*, 11 L. T. Rep. N. S. 184, and the judgment of Willes, J., approving of that dictum in *Grill General Iron Screw Collier Company*, 14 L. T. Rep. N. S. 715, were adopted. Willes, J., said: "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use." Crompton, J., in delivering the opinion of the court said: "It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron in the court below, where he says, 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them;'" and he added, "for all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill and diligence, is gross negligence." M. Smith, J., in the case in which the above-mentioned observations of Willes, J., were made, said: "The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence." Commenting on this case, Lord Chelmsford said: "It is hardly correct to say that the Court of Exchequer Chamber in the case referred to adopted the view of Lord Cranworth as to the impropriety of the term 'gross negligence;'" and the judgment of the Privy Council proceeds:—"The 'epithet 'gross,' is certainly not without its significance. The negligence for which, according to Lord Holt, a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is respon-

\* See post, page 318.

## A WARNING—CURIOUS TENURES.

sible, and there would be the same difficulty of defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility. In truth, this difficulty is inherent in the nature of the subject, and, though degrees of care are not definable, they are with some approach to certainty distinguishable; and in every case of this description in which the evidence is left to the jury, they must be led by a cautious and discriminating direction of the judge to distinguish, as well as they can, degrees of things which run more or less into each other."

Here we have another of the judicial difficulties which abound in our procedure, similar to which is the dilemma when a Judge is to decide the question of libel or no libel, and what is the meaning of "corruptly" in the Corrupt Practices Act. Such difficulties are inevitable, and call for the exercise of the highest order of judicial mind.

Incidentally as regards this case we would notice a point which is of some importance. It was argued by the Solicitor General that when a banker takes charge of extremely valuable securities every care for their safety ought to be supplied, and that such was not taken may be presumed from the fact that additional precautions have been adopted since this loss occurred. The fallacy of such an argument is shown in a case in the Exchequer which we report to-day. There a pointsman had run an engine on to a branch line and caused damage for which the company was sued. The engine was a runaway, the one man in charge of it, who for twenty years had single-handed taken it to be coaled, having fallen in a fit. Since the accident the company took precautions to prevent a recurrence of the catastrophe. It was argued that this fact was evidence of negligence previous to the catastrophe; but the court held not, Mr. Baron Bramwell observing that because the world grows wiser every day it is not to be concluded that it was foolish before. The argument is a very seductive one, and likely to lead to error.—*Law Times*.

## A WARNING.

A solicitor at Braintree has been sentenced to twelve months' imprisonment for appropriating to his own use the moneys of his client. This is, we believe, the first time that the offence, which is only too common, has been punished by indictment; plundered clients having been ignorant of the remedy or reluctant to enforce it. Now that it is known there can be no doubt that it will be more frequently resorted to by those whose confidence has been betrayed. Nor in the true interests of the Profession can we object to the law itself or its enforcement. In very truth there is no real difference between robbery by appropriating the money which clients have confided to the care of a solicitor, or which he has received

for them in the course of business, and picking a pocket, or robbing a till. If anything, the solicitor is guilty of the greater crime, for he adds breach of trust to theft, and uses the confidence of his employer for the purpose of robbing him. No excuse whatever can be offered for this crime, for no circumstances whatever will justify a solicitor in using for his own purposes the money which he holds in trust for others, whether that money has been given to him by his client for investment, or whether it has been received by him for his client. The moment he applies any portion of that money to his own use, he is guilty of dishonesty, and has committed a crime, even if done with design to refund it.

We fear that the offence of thus misappropriating the property they hold in trust is more frequent than the public are aware. It results from the practice, against which we have so often and earnestly warned our readers, of mingling their clients' money with their own—a course to be sedulously shunned by every prudent solicitor. Debts recovered, purchase moneys received, rents collected, and such like, are too frequently paid to the private account of the solicitor at the bank; he cannot, or will not, distinguish what of the balance is his own, and what the property of others which he holds in trust; he draws upon the whole balance for his private uses, invades the property of his client, deluding his conscience with the suggestion that he does not know what is his own, averts some present pressure by the tempting crime, in the vain hope that something may turn up to save him. It is thus that hundreds of solicitors have been brought to ruin in times past, and if the Woodbridge example should be followed, it is thus that many will hereafter be brought to the felon's dock and the convict's prison.

The warning we have given before we would emphatically repeat now. Make it an inflexible rule never to mingle your client's money with your own. Keep a separate account at the bank and pay over whatever you receive for a client with the least possible delay. By observing this rule, you will avoid the double risk of temptation and of error. You will both gain clients and keep them; for there is nothing that so recommends a solicitor to men of business as prompt paying over of debts collected and moneys received, and it will promote your peace of mind as much as it will advance your prosperity.—*Law Times*.

## CURIOUS TENURES.

Ludewell, County of Oxford.—Robert de Eston and Jordan de Wotton hold of our lord the King one hide of land, in the town of Ludewell, by the serjeanty of preparing or dressing the herbs of our lord the King in Woodstock.

Margery de Aspervil held one yard-land † of

† The quantity varies in different places from 16 to 40 acres.



C. L. Cham.]

MORRIS V. LESLIE—WALLACE V. ACRE.

[C. L. Cham.]

our lord the King in capite,\* in Aylesbury, in the County of Bucks, by the serjeanty of keeping all the distresses made for the King's debt by the summons of the Exchequer.

The manor of Banbury was held by the Bishop of Lincoln, by the serjeanty of one hundred and forty hens, and one thousand three hundred eggs.

All the bondmen (servi) of Chakendon, in the County of Oxford, for the service of mowing, were to have of the lord one ram of the price of eight-pence at least, and every mower was to have a loaf of the price of a half-penny; and they jointly were to have a cartload of wood, and a cheese of the price of fourpence, and a certain quantity of small beer. And every yard-land was to have six tods of grass, and half a yard-land three tods.

The Barons Furnival held Fernham, in the County of Bucks (now called Franham Royal), by the service of finding their sovereign lord the King, upon the day of his Coronation, a glove for his right hand, and to support his right arm the same day, whilst he held the regal verge or sceptre in his hands.

At the Coronation of King Henry IV. Sir Thomas Neville, Lord Furnival, by reason of his manor of Furneham, with the Hamlet of Cere, which he held by the curtesie of England, after the decease of his wife, the Lady Joane, gave to the King a glove for his right hand, and sustained the King's right arme so long as he bare the sceptre.—*Oxford Journal*.

## ONTARIO REPORTS.

### COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

#### MORRIS V. LESLIE.

*Prochein amy—Security for costs.*

1. An application to remove the next friend of an infant plaintiff on the ground of insolvency, or to stay proceedings till security for costs is given, must be made promptly after declaration served, according to the rule in ordinary cases when security for costs is applied for.
2. When the court has appointed the natural guardian of the infant as next friend, and it appears probable that no one else can be found to act in time for the assizes, and no imposition has been practised upon the court in making such appointment, such next friend will not be removed nor will he be ordered to give security for costs although in destitute circumstances.

[Chambers, September 21, 1869.]

An order was made on the 1st September, 1869, to admit Margaret Morris, mother of the plaintiff, to prosecute the action as her next friend. This order was served on defendant's attorney along with the declaration on the 4th September. After allowing the time for pleading to expire the defendant delivered a summons to plead several matters, upon which an order was obtained on 16th September. The pleas were served on the 18th September, and on the same day issue was joined and notice of trial was served just in time for the Belleville Assizes.

\* Capite was a tenure held of the King immediately.

On the 21st September the defendant obtained a summons calling on the plaintiff to show cause why the appointment of the above named *prochein amy* should not be revoked, and why all proceedings herein should not be stayed until a responsible person be appointed as *prochein amy* in his stead, or why all further proceedings herein should not be stayed until such next friend should give to the defendant security for his costs herein; upon the ground that the said *prochein amy* is not a responsible person, and not in solvent circumstances, and not good for defendant's costs herein.

J. A. Boyd shewed cause. He filed affidavits detailing the proceedings, and in which it was alleged, that compelling the plaintiff to give security for costs would be equivalent to preventing her from prosecuting the action, and that in any event she could not get such security in time for the approaching Assizes. He contended,

1. That the delay in making the application had been too great: See Rule of Court. No. 23, *Harrison's C. L. P. Act* 603; *Fogo v. Pypher*, 3 P. R. 309; *Somers v. Carter*, 15, 828; *Aldhead v. Upton*, 22 U. C. Q. B. 43; *Torrance v. Gross*, 2 P. R. 65; *Morgan v. Helms*, 1 P. R. 363; *Wainwright v. Blaut et al.*, 2 C. M. & R. 740, (per Alderson, B.)

2. Insolvency of the *prochein amy* is not established here, and even if established, she is the natural guardian, and no other person can be held to act: *Lees v. Smith*, 5 H. & N. 632; *Adair on Costs*, pp. 10, 11; *Watson v. Fraser*, 8 M. & W. 660; *Morgan & Davey on Costs*, 251; *Duckett v. Satchwell*, 12 M. & W. 779.

The following authorities were cited in support of the summons: *Arch. Prac.*, 12th ed., p. 1242; *Lees v. Smith*, 29 L. J. Ex. 294; *Munn v. Berthen*, 4 Moo. & P. 215.

GALT, J.—The summons must be discharged on both grounds.

*Summons discharged.*

#### WALLACE V. ACRE.

*Ejectment—Vacant possession—Setting aside writ.*

A writ of ejectment was issued against the defendant, who (as was alleged by the plaintiff and not denied by the defendant) claimed to be owner of the land in question. The possession was vacant; and it was not shown that the defendant was last in possession. Held, that the defendant was entitled to have the writ set aside without disclaiming title.

[Chambers, Sept. 23, 1869.]

This was a summons calling on the plaintiff, amongst other things, to shew cause why the writ of summons in ejectment herein, copy and service thereof, and præcipe therefor, or some or one of them, should not be set aside with costs, on ground that said defendant was improperly made a defendant.

The facts antecedent to the bringing of this suit appear in *Livingstone v. Acre*, 15 Grant 610, and *Acre v. Livingstone et al.*, 26 U. C. Q. B. 282. The defendant in this suit had brought an action of ejectment against the plaintiffs and the said Livingstone, to which they appeared. Wallace limiting his defence to one-half, and Livingstone to the other. An order was subsequently made directing their appearances to be withdrawn, and

O. L. Cham.]

BARBER V. ARMSTRONG.

[C. L. Cham.]

giving Acre leave to sign judgment. Wallace neglected to withdraw his appearance as directed, and Acre took no steps to obtain judgment, or to take possession of the land which was offered to him. It consequently remained vacant, at least so far as concerned the fifty acres claimed by Wallace.

Many other facts appeared on affidavit and were discussed, but were not material to the point on which the case turned.

*O'Brien* shewed cause:—

1. So long as a defendant is either in possession of or claims any interest in the land, the writ against him cannot be set aside; and he does not now, as he should do to make out his case for relief on this application, disclaim title or interest: *Hall v. Yuill*, 2 Prac. R. 242; *D'Arcy v. White*, 24 U. C. Q. B. 570, and see *Kerr v. Waldie et al.*, 3 C. L. J., N. S., 292, 4 Prac. R. 188.

2. The writ may properly be directed to the person "entitled to defend the possession of the property claimed," even though he be not in actual possession: Ejectment Act, sec. 1, 2. And the writ need not now be directed, in case of a vacant possession, to the person last in possession, as was the law under 14, 15 Vic. cap. 114, sec. 1.

*J. A. Boyd*, contra:—

The writ should have been directed, this being vacant land, to the person last in actual possession: *Street v. Crooks et al.*, 6 U. C. C. P. 120; *Benson v. Connor*, *Id.*, 859; and the writ not being addressed to the tenant in possession is irregular: *Thomson v. Slade*, 25 L. J. Ex. N. S. 806.

The sole question to be determined in ejectment is, who is entitled to the possession without regard to the manner in which he has entered: *Robinson v. Smith*, 17 U. C. Q. B. 218.

RICHARDS, C. J.—I cannot hold that a person can be compelled to defend an action brought to recover possession of land of which he is not at the time in possession, even though he may claim to be the owner of it. Of course if he does not desire to litigate, he need not appear, but then he makes himself liable for costs in an action for mesne profits. Possession in this case appears to be open to either party, but neither seems to be desirous of taking it.

I think the orders should go, but as the conduct of the defendant does not appear to me to be what it should have been, looking to all the facts as they appear from the affidavits, the order will go without costs.

*Order accordingly.*

#### BARBER V. ARMSTRONG.

*Replevin—Pleading.*

*Held*, 1. That section 18, Con. Stat. U. C. cap. 29, applies only to cases of a wrongful taking and detention within the latter part of section 1 of that act.

2. That the second count of the declaration set out below was in case and not in replevin, and could not therefore be joined with an ordinary count in replevin; but even if intended to be a count in replevin under the provisions in the latter part of section 1 it is improper, the facts being, that the action was against a pound-keeper for detaining certain horses distrained *damage feisant*, and therefore a case "in which by the law of England replevin might be made," and in either case the count must be struck out.

[Chambers, November 1, 1869]

This was an action of replevin. The declaration contained two counts; the first an ordinary

count in replevin, but omitting to state the locality in which the taking took place. The second count in its introductory part stated that the defendant was a pound-keeper, and as such received and took into his custody certain goods and chattels of the plaintiff, to wit, certain horses, &c., and that whilst the said goods and chattels were in the defendant's custody as such pound-keeper as aforesaid, and previous to the sale thereof, he, the plaintiff, considering and contending that the said goods and chattels had been and were illegally impounded in pursuance of and as required by the fourth sub-section of section 355 of 29 & 30 Vic. ch. 51, offered to give to the defendant and tendered to him good and sufficient and satisfactory security for all costs, damages and expenses that might be established against him, and did thereupon, as the owner of the said goods and chattels, demand from the said defendant the delivery up of the said goods and chattels to him, the plaintiff, as he lawfully might. Yet the defendant wrongfully refused to accept the said security or any security whatsoever, and wrongfully refused to deliver up to the said plaintiff the said goods and chattels, and unjustly detained the same from the said plaintiff against sureties and pledges, until, &c.

Upon being served with this declaration the defendant obtained a summons calling upon the plaintiff to show cause why the second count of the declaration should not be struck out, on the ground that the same is calculated to prejudice, embarrass and delay the fair trial of this action, and that the said count cannot, if in case, properly be joined with the first count of the said declaration, and if in replevin is separable; or why the defendant should not be at liberty to plead and demur to the declaration, on the ground that there is a misjoinder of counts, or why the first count should not be amended at plaintiff's expense, by stating the particulars of the place whence the chattels, &c., therein mentioned, were taken.

*D. McMichael* shewed cause, contending that although the first count was in replevin yet that supposing the second count to be in case, it might be joined under the provisions of the first section of Con. Stat. U. C. ch. 29, entitled, "An Act relating to Replevin," otherwise it would not be possible for the plaintiff to avail himself of the provisions therein contained for "the recovery of the damages sustained by reason of such unlawful caption and detention, or of such unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses." And if even nominal damages are given, and such would be the result without such a count as this, such recovery could be pleaded in bar of any subsequent action for substantial damages.

*Oslor*, for the defendant, contended that the count was in case, in which event it was a misjoinder of action, under the provisions of the Common Law Procedure Act, section 73, or if it should be held to be in replevin then it was unnecessary and should be struck out, and that the provisions of the act relating to replevin respecting damages did not refer to cases like the present, but to cases where the plaintiff brought replevin in place of trespass or trover. He also contended that in this case it was necessary to

Eng. Rep.]

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[Eng. Rep.]

state the place where the wrongful taking and detention took place, as this case did not fall within the provisions of section 18 of the replevin act.

GALT, J.—It is very difficult to say whether the second count is in replevin or in case for wrongfully refusing to accept the security mentioned in the declaration, although it concludes in the ordinary form of a count in replevin. I incline to think that it is in case, and, as such, is in contravention of the 73rd section of the Common Law Procedure Act, and must be struck out, but it is of very little consequence whether I am correct in this view, because if it is intended to be in replevin, it ought to be struck out as superfluous for the following reasons—From the affidavits filed it appears that this is an action against a pound keeper for detaining certain horses distrained damage feasant and placed in the pound, it is therefore a case “in which by the Law of England replevin might be made,” and does not fall within the latter part of the 1st section of the replevin act, which was the portion relied upon by Dr. McMichael. The part referred to is as follows, “or in case any such goods, &c., have been otherwise wrongfully taken or detained, the owner or other person capable at the time this act takes effect of maintaining an action of trespass or trover for personal property may bring an action of replevin for the recovery thereof, and for the recovery of the damages sustained,” &c., as before mentioned. If, therefore, the second count is intended to be in replevin under the foregoing provisions, it is wrong, because being a case in which by the law of England replevin might be made, the said provisions do not apply. It also appears to me that the 18th section applies only to cases of a wrongful taking and detention within the latter portion of the first section, and not to cases of unlawful distresses for damage feasant, and therefore that local description is necessary. The summons is therefore made absolute to strike out the second count, and to amend the first with costs, and the defendant to have eight days time to plead to the amended declaration.

*Order accordingly.*

## ENGLISH REPORTS.

### JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.)

#### GIBLIN AND OTHERS V. McMULLIN.

*Victoria—Deposit of property at a banker's—Liability of gratuitous bailees—Gross negligence—Nonsuit.*

A box containing debentures and other securities was deposited at a bank, the depositor keeping the key. The bank received no payment for their care of the box, which was kept in a strong room with similar boxes of other customers, and with property belonging to the bank.

The debentures were stolen by the cashier of the bank.

In an action by the depositor against the bank, the jury found a verdict for the plaintiff, but a rule to enter a nonsuit was afterwards made absolute.

On appeal to the Judicial committee,

*Held*, that the bank were not bound to more than ordinary care of the deposit entrusted to them, and that the neg-

ligence for which alone they could be made liable would have been the want of that ordinary care which men of common prudence generally exercise about their own affairs.

It is not, however, sufficient to exempt a gratuitous bailee from liability, that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence.

The term “gross negligence” is not intended as a definition, but is useful as expressing the practical difference between the degrees of negligence for which different classes of bailees are responsible.

The modern rule as to nonsuit is that in every case before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly find a verdict for the party producing it, upon whom the onus of proof is imposed.

A nonsuit may be directed even after the defendant has entered on his case, and evidence given by the latter may be used for the purpose of a nonsuit.

[21 L. T. Rep. N. S. 214.]

This was an appeal against a judgment of the Supreme Court of Victoria. The then plaintiff, Mr. Richard Lewis, brought an action against the defendant (the present respondent), as inspector of the Union Bank of Australia.

The declaration stated that the plaintiff delivered to the said bank certain railway debentures to be safely kept and taken care of by the bank for reward, and the bank received the debentures into their care and keeping, for the purpose and on the terms aforesaid, yet the bank kept the debentures in a negligent manner, and took no care of the same, whereby they were lost to the plaintiff. The second count charged the bank with negligence as gratuitous bailees.

The defendant pleaded not guilty, and a traverse of the delivery and receipt of the debentures by the bank.

At the trial, in Nov. 1866, on the close of the plaintiff's case, the counsel for the defendant applied for a nonsuit. The judge refused to stop the case, but gave leave to move to enter a verdict for the defendant. It was understood, however, that the rule, if absolute, should be for a nonsuit, and not to enter a verdict. The defendant then called evidence, and the jury found a verdict for the plaintiff for £10,450.

The rule to set aside the verdict and enter a nonsuit was subsequently made absolute, the respondent thereupon signing final judgment.

The appellants were the executors of Mr. Lewis, who died in Nov. 1867.

The circumstances of the case are fully stated in the judgment.

*The Solicitor General* (Sir J. D. Coleridge, Q. C.) for the appellants.—In all cases where negligence is imputed to a bailee, whether gratuitous or for hire, the question is, what amount of attention, care, and skill can be insisted on by the bailor, so that on damage for its omission he may have an action against the bailee. This question is one of fact for a jury. A confusion has arisen from the use of the word “gross,” as expressing the degree of negligence for which gratuitous bailees are to be liable, and from misusing the term “negligence” as if it were an affirmative word. Willes, J. stated the principle correctly in *Grill v. General Iron Screw Collier Company*. 14 L. T. Rep. N. S. 715; 35 L. J., N. S. 330, C. P. “I own I entirely agree with the dictum of Cranworth, L. J. in *Wilson v. Brett*, 11 M. & W. 113; 12 L. J., N. S. 264, Ex., that

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'gross negligence' is ordinary negligence with a vituperative epithet. That was the law laid down in *Wyld v. Pickford*, 8 M. & W. 448, and upheld and recognised in the Exchequer Chamber in the judgment of Crompton, J. in *Beal v. South Devon Railway Company*, 3 H. & C. 387; 11 L. T. Rep. N. S. 184. The confusion seems to have arisen in using the word 'negligence' as if it was an affirmative word, whereas in truth it is a negative word; it is the absence of such care, skill, and diligence as it was the duty of the person to bring to the performance of the work which he is said not to have performed. Then, if you begin with that, what is the amount of care, skill, and diligence which a man ought to bring? In the case of a gratuitous bailment it is said, if you employ a man of no skill to ride your horse, he is bound to use such skill as he possesses, and that you can require no more, and that he is liable for gross negligence in that sense. But if you employ a man to ride your horse who professes to be a groom, he would be answerable unless he had competent skill in horseriding. Therefore the word "gross" is a word which, as pointed out by Sir Patrick Colquhoun in his summary of the Roman civil law (ss. 1530-8), is used as a description, not as a definition. If we have to separate law from fact, and to leave the question of fact to the jury, we could not get nearer to a practical definition of 'gross negligence' than such negligence as is actionable." This, then, was a question rightly left to the jury, and their finding ought not to be disturbed. And the evidence given at the trial was sufficient to support the verdict. When a banker takes charge of extremely valuable securities, every care for their safety ought to be supplied, and that such was not taken may be presumed from the fact that additional precautions have been adopted since this loss occurred. It may be true that Fletcher had been long in the employment of the bank, and that nothing was known against him, but it would appear from the evidence that a gentleman from England called on the manager of the bank and told him that he had expected to receive money from Fletcher and had not received it. This should have put him on his guard against Fletcher. Then there is evidence that violence had been attempted on the box, and it was suggested that Fletcher took the box away, had it picked by a locksmith, and then returned it. If this were possible, there must have been negligence in the arrangements at the bank. The mere fact that the bank took as great care of Lewis's strong box as they did of their own property would not rebut their liability. Lord Holt's dictum in *Coggs v. Bernard*, 1 Sm. L. Cas. (5th edit.) 179, was, that if a mere depositary "keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own is an argument of his honesty. . . . As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen and his own, yet he shall not be charged, because it is the bailor's own fault to trust such an idle fellow." But this was clearly overruled in *Doorman v. Jenkins*, 2 A. & E. 266, where Denman, C. J., directed the

jury that it did not follow from defendant's having lost his own money, at the same time as the plaintiff's, that he had taken such care of plaintiff's money as a reasonable man would ordinarily take of his own; and he added that that fact afforded no answer to the action if they believed that the loss occurred from gross negligence. [Lord CHURCHILL said the degree of negligence for which a particular bailee is liable must be a matter of law on which the jury would have to be directed by the judge, and referred to *Shiells v. Blackburne*, 1 H. Bl. 159.] The case of *Shiells v. Blackburne* has been misunderstood, and has been supposed to show that the question of negligence is a matter of law, but the verdict was there set aside because the court thought that there was no evidence of negligence to go to a jury, and that they had found the fact erroneously. (See the comments of Paterson, J., in *Doorman v. Jenkins*, 2 A. & E. 263.)

*Watkin Williams* (Beresford with him) on the same side.—The rule to set aside the verdict and to enter a nonsuit ought not to have been made absolute but should have been discharged. The judge at the trial below ought to have left to the jury the question whether the bank was guilty of that particular degree of negligence for which gratuitous bailees are liable. The defendant at the trial, instead of relying on the objections that plaintiff had not made out a case for the jury, chose to go into evidence of his own. Some of this evidence, particularly the fact of the chance made in the bank arrangements after the discovery of the loss, was favorable to the plaintiff. This evidence might have been in answer to the application for a nonsuit. [*Mellish*, Q. C., agreed that it should be considered whether upon the whole evidence there ought to have been a nonsuit.] We admit that the bankers were gratuitous bailees; that they are not liable for deposited property stolen by a clerk or servant employed about the bank, unless they have knowingly hired or kept in their service a dishonest servant, and that they were only bound to take ordinary care; but whether they took this care is a question for the jury. The rule given by Lord Loughborough, in *Shiells v. Blackburne*, 1 H. Bl. 163, is that "if a man gratuitously undertakes to do a thing to the best of his skill, where his situation is such as to imply skill, an omission of that skill is imputable to him as gross negligence." Here the bankers, if they neglected precautions which their business ought to have suggested, were guilty of gross negligence. As observed by Lord Denman, in *Doorman v. Jenkins*, 2 A. & E. 265, it is "impossible for a judge to take upon himself to say whether negligence is gross or not." In *Wilson v. Brett*, 11 M. & W. 113, a person conversant with and skilled in horses, rode a horse at the owner's request, for the purpose of showing it for sale; the horse fell and was injured, and the judge in summing up told the jury that the rider, the defendant in the action, having been shown to be skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it. The jury found a verdict for the plaintiff, and the court refused a new trial on the ground of misdirection. Alderson, B., observes: "This defendant being shown to be a person of competent skill, there was no dif-

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ference between his case and that of a borrower; because the only difference is, that then the party bargains for the use of competent skill, which here becomes immaterial, since it appears that the defendant had it." And in the judgment of Rolfe, B., who tried the case, occurs the passage, "If a person more skilled knows that to be dangerous which another not so skilled as he does not, surely that makes a difference in the liability? I said I could see no difference between negligence and gross negligence—that it was the same thing with the addition of a vituperative epithet—and I intended to leave it to the jury to say whether the defendant, being, as it appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence." [Lord CHELMSFORD said that *Wilson v. Brett* was a case of misfeasance, not of negligence, and that he saw no objection to the term "gross" negligence, which was useful in expressing the degree of negligence for which certain classes of bailees are responsible. The term, moreover, had been approved by Lord Holt, Sir William Jones, and other eminent authorities.] A similar rule was laid down in *Beal v. South Devon Railway Company*, 8 H. & C. 841; 11 L. T. Rep. N. S. 184. See, too, the cases of *Peninsular and Oriental Steam Navigation Company v. Shand*, 1 Moo. P. C. N. S. 872; 12 L. T. Rep. N. S. 809; *Dansey v. Richardson*, 8 E. & B. 114.

*Mellish Q.C.*, for the respondent.—Where bankers take charge of their customers' goods under such circumstances as the present, it must be understood that the customers will take their chance of loss. If whether they have taken proper care is to be a question dependent on the opinion of a jury, what banker would accept such a liability without reward? There was no evidence of negligence, except that the cashier was allowed to have access by himself to the strong room. The plaintiff knew that this was the custom of the bank, and after the deposit of his property if any change was made it was for his benefit, rather than to his disadvantage. And, indeed, to allow access to the confidential servant alone would probably involve less risk than to let two go together. The boxes were kept in the strong room for the convenience of depositors, and it cannot be contended that there was any negligence in the bankers because they did not put these bonds in the one of the two inner rooms which they reserved for bullion and unsigned notes. Lord Holt, in his judgment in *Coggs v. Bernard*, in saying that, when a man takes goods into his custody to keep for the bailor without reward, the bailee will be chargeable if guilty of "some gross neglect," clearly means "wilful" negligence, which would be near to fraud. [Lord CHELMSFORD—It is difficult of definition; but gross negligence seems to mean "utter carelessness."] For he bases this part of his judgment on Justinian's Institutes, Book III., tit. 15, where the liability of a depositary is thus defined: "Ex eo solo tenetur, si quid dolo commissum; culpa autem nomine, ita est, desidia ac negligentia non tenetur." And this rule was acted on in an American case, very like the present, *Foster v. Essex Bank*, 17 Mass 478, where a cask of doubloons was deposited by the plaintiff with the defend-

ants, and the cashier or clerk of the bank stole a great portion and afterwards absconded. The bank was held not to be liable on the grounds expressed in the following passage from the judgment of Parker, C. J., (p. 497). "It will not be disputed that if (this contract) amounts only to a naked bailment, without reward, and without any special undertaking, which is the civil and common law is called *depositum*, the bailee will be answerable only for gross negligence, which is considered equivalent to breach of faith; as everyone who receives the goods of another in deposit, impliedly stipulates that he will take some degree of care of them. The degree of care which is necessary to avoid the imputation of bad faith, is measured by the carefulness which the depositary uses towards his own property of a similar kind. For although that may be so slight as to amount even to carelessness in another, yet the depositor has no reason to expect a change of character in favor of his particular interest, and it is his own folly to trust one who is not able or willing to superintend with diligence his own concerns. . . . The dictum of Lord Coke that the bare acceptance of goods to keep implies a promise to keep them safely so that the depositary will be liable for loss by stealth or accident (*Southbrooke's case*, 4 Co. 83), is entirely exploded . . . having been fully and explicitly overruled by all the judges in *Coggs v. Bernard*. . . . 'Now the law seems to be settled that such a general bailment will not charge the bailee with any loss, unless it happen by gross neglect, which is construed to be an evidence of fraud. But if he undertakes specially to keep the goods safely and securely, he is bound to answer all perils and damages that may befall them for want of the same care with which a prudent man would keep his own.' (2 Bl. Comm. 453.) And this certainly is the more reasonable doctrine, for the common understanding of a promise to keep safely would be that the party would use due diligence and care to prevent loss or accident; and there is no breach of faith or trust if, notwithstanding such care, the goods should be spoiled or purloined. Anything more than this would amount to an insurance of the goods, which cannot be presumed to be intended, unless there be an express agreement and an adequate consideration therefor. The doctrine, as thus settled by reason and authority, is applicable to the case of a single deposit in which there is an accommodation to the bailor, and the advantage is to him alone. He shall be the loser, unless the person in whom he confided has shown bad faith in exposing the goods to hazards to which he would not expose his own. This would be *crassa negligentia*, and for this alone is such a depositary liable." The court then went into the facts, and proceeded (p. 504): "Upon this state of facts, we think it most manifest that, as far as the bank was concerned, this was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank, which can tend to increase its liability beyond the effect of such a contract. No control whatever of the chest or the gold contained in it was left with the bank or its officers. It would have been a breach of trust to have opened the chest or to inspect its contents. The owner could at any time have withdrawn it,

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there being no lien for any price of its custody, and it was not right that the bank had authority to remove it to a place of greater safety without the orders of the owner. If it be possible to constitute a gratuitous bailment, or simple deposit, this was one. . . . Such deposits are indeed simply gratuitous on the part of the bank, and the practice of receiving them must have originated in a willingness to accommodate members of the corporation with a place for their treasures, more secure from fire and thieves than their dwelling-house or stores. . . . (P. 507): The contract being, then, only a general bailment, the third question to be discussed is whether the contract has been cancelled by the bank. . . . The rule to be applied to this species of bailment is that the depositary is answerable in case of less for gross negligence only or fraud which will make a bailee of any character answerable. Gross negligence certainly cannot be inferred here, for the same care was taken of this as of other deposits, and of the property belonging to the bank itself. . . . We have thus prepared the way for the discussion of the great question in the case, and we believe the only one on which doubts could be entertained. The loss was occasioned by the fraud or felony of two officers of the bank, the cashier and chief clerk. We shall not consider whether the act of taking the money was felonious or only fraudulent, as the distinction is not important in this case, the question being whether there was gross negligence, and that fact may appear by suffering goods to be stolen, as well as if they were taken away by fraud. . . . No fraud is directly imputed to the bank, it being found that the directors who represent the company were wholly ignorant of the transactions of the cashier and chief clerk in this respect. The point, then, is narrowed to the consideration whether the corporation, as bailee, is answerable in law for the depredations committed on the testator's property by two of its officers. (Authorities were reviewed by the court) . . . I think it may be inferred from all this, as a general rule, that to make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment; and that if he steps out of it to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any stranger. The cases of innholders, common carriers, and perhaps ship masters or seamen, when goods are embezzled, are exceptions to the general rule, founded on public policy. We are then to inquire whether, in this case, when the gold was taken from the cask by the cashier and clerk, they were in the course of their official employment. Their master, the bank, had no right to meddle with the cask or open it, and so could not lawfully communicate any such authority, and that they did not in fact give any, is found by the verdict. . . . The cask was never opened but by order of the owner, until it was opened by the officers for a fraudulent or felonious purpose. It was no more within the duty of the cashier than of any other officer or person to know the contents or to take any account of them. If the cashier had any official duty to perform relating to the subject, it was merely to close the doors of the vault when banking hours were

over, that this, together with other property, should be secure from theft. He cannot, therefore, in any view be considered as acting within the scope of his employment when he committed this villainy, and the bank is no more answerable for this act of his than they would be if he had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank. . . . The undertaking of banking corporations, with respect to their officers, is that they shall be skillful and faithful in their employments; they do not warrant their general honesty and uprightness." The principles above stated are all applicable to the present case; though the latter is weaker against the bank than the American case, for in that it appears that an exact account of the gold deposited was left with the cashier, who gave a receipt for it, while here the bank knew nothing about the contents of the plaintiff's box. There are doubtless observations in *Doorman v. Jenkins*, 2 A. & E. 256, tending to show that the question of negligence is for the jury. But there was some evidence of gross negligence in the opinion of the court. And many modern cases establish the proposition that, unless there is some evidence upon which the jury can reasonably find that negligence existed, the question should be withdrawn from them. Thus in *Toomey v. London, Brighton, and South Coast Railway Company*, where the plaintiff, while waiting at the defendants' station, mistook the lamp room for the urinal, fell down some steps and was injured, Williams, J., says, "It is not enough to say there was some evidence; for every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence." And this rule was adopted and approved in *Cornman v. Eastern Counties Railway Company*, 4 H. & N. 781, and in *Colton v. Wood*, 8, C. B., N. S. 568. In the latter case Erie, J., observes (p. 573), "The very vague use of the term 'negligence' has led to many cases being left to the jury in which I have been utterly unable to find the existence of any legal duty or any evidence of a breach of it." And Williams, J., adds, "There is a rule of the law of evidence, which is of the first importance, and is fully established in all the courts, viz., that, where the evidence is equally consistent with either view, with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury. A still stronger case is that of *Croft v. Metropolitan Railway Company*, 1 L. Rep. C. P. 300, where the plaintiff was injured by falling, in consequence of the slippery brass nosings on the stairs. Two witnesses of the plaintiff's, one of whom was a builder, stated that in their opinion the staircase was a dangerous one, and the defendants called no witnesses to contradict. Yet it was held that there was no evidence to go to a jury. M. Smith, J., remarks, "The court is, in an especial manner, bound to see that the

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evidence submitted to the jury in order to establish negligence is sufficient and proper to go to them." [Lord CHELMSFORD referred to *Ryder v. Wombwell*, L. Rep. 4 Ex. 32; 19 L. T. Rep. N. S. 491.]

*Jos. Brown, Q.C., (Murray and J. D. Wood with him), on the same side.*—It is admitted that plaintiff's box had the same care as other customers' property, and as the property of the bank. The appellants are in fact urging that we ought to have taken special care of plaintiff's property. Even in the case of a bailment of goods to be kept for hire, it was held by Lord Kenyon, in *Finucane v. Small*, 1 Esp. 314, that positive negligence must be proved, and that if "the goods were lodged in a place of security, where things of much greater value were kept, this is all that it was incumbent on the defendant to do; and if such goods are stolen by the defendant's own servant, that is not a species of negligence of a description sufficient to support this action, inasmuch as he has taken as much care of them as of his own:" (See, too, *Story on Bailments*, ss 63, 65, 66, 67, 71-3, 76-9) *Doorman v. Jenkins* (*ubi sup.*), differs from the present case, for there the plaintiff did not get the care he expected, which here he did. And it would not fix the bank with liability to show that there were some additional precautions which they might have adopted, for as said by Montague Smith, J., in *Cryder v. The Metropolitan Railway Company*, 1 L. Rep. C. P. 804, "the line must be drawn in these cases between suggestions of possible precautions and evidence of actual negligence, such as ought reasonably and properly to be left to a jury."

*Watkin Williams* replied.

Judgment was delivered by Lord CHELMSFORD:—This is an appeal from a judgment of nonsuit of the Supreme Court of the colony of Victoria in an action by the appellant's testator against the respondent. The action was brought against the defendant as inspector of the Union Bank of Australia, to recover damages for the negligent keeping of certain railway debentures delivered to the bank to be safely kept and taken care of. The plaintiff, who resided at Hobart Town, in Tasmania, had an account with the Union Bank of Australia from the year 1857. From the earliest period of his becoming a customer of the bank, he had placed in their care a box, of which he kept the key, containing securities, deeds and debentures. The bank received no consideration for taking care of the deposits of their customers. In the month of January, 1862, the plaintiff purchased the railway debentures in question and put them in his box. The box appears always to have been kept in a strong room underground, in which the boxes of other customers of the bank were placed. There were also in this strong room the manager's box, containing bills for discount and collection, worth from £1,500,000 to £2,500,000, teller's boxes, worth £50,000, and securities of the Royal, Central, and Agric. Banks, in which the Union Bank was interested. The access to this room could only be obtained by passing through a compartment of the office which was separated from the part where the clerks were employed by a partition about five feet high. In this

compartment Fletcher, the cashier, always sat during bank hours, and a messenger slept there during the night. There was a wooden door in this compartment which opened upon a flight of steps leading to the room where the plaintiff's box was deposited. This room had two iron doors, which were opened by separate keys. Fletcher always kept the key of the wooden door, and also, during the day, the keys of the two iron doors, but at the time the debentures in question were placed in the box one of the keys of the iron doors only was kept by him at night, the other being taken care of by another officer of the bank. Beyond the room where the box was there were two other rooms; in the outer of the two uncoloured gold was kept, in the inner, bullion, and unsigned notes of the bank. The manager kept the key of the outer of these two rooms, and one of the directors of the bank that of the inner one. The plaintiff had frequent opportunities of seeing how and where his box with the debentures was kept. The customers were permitted to have access to their boxes during the bank hours, but always in the presence of a bank clerk. The plaintiff occasionally went down to the strong room to take the coupons from his debentures for collection, but generally the box was brought up to him. The coupons when taken from the debentures were always given by the plaintiff to Fletcher to collect for him. On the 19th April, 1864, the plaintiff went to the bank and asked for his box. Fletcher brought it to him. The plaintiff opened the box, took out his debentures, and carried them away. He then cut off the coupons, took back the debentures, replaced them in the box, locked it, and gave the coupons to Fletcher to collect for him as usual. Before the plaintiff's next visit to the bank, Fletcher had abstracted the debentures. The exact time at which this act of dishonesty was committed cannot be ascertained, but it must have been before the month of July, 1864, as Fletcher then left the bank on leave of absence and never returned. Up to the time of his leaving he had always maintained a good character. The plaintiff did not come again to the bank till the 8rd July, 1865. He then went into the strong room and took out of his box some gas shares. On the following day he returned to the bank and had his box brought up to him, when he discovered that the debentures were gone. All the material facts above stated were proved in the course of the plaintiff's case; that the bank were gratuitous bailees; that the plaintiff had known for years the manner in which the bank kept the property of their customers deposited with them, and the means which they employed for its protection, and that the debentures were dishonestly taken away by Fletcher. At the close of the plaintiff's case, the counsel for the defendant applied for a nonsuit on the ground that the bank being gratuitous bailees no evidence had been given of such negligence as would render them liable for the loss of the debentures. The judge refused to stop the case, but reserved leave to the defendant to move to enter a nonsuit. The defendant thereupon went into his cave and called witnesses. The only material additions which he made to the facts proved by the plaintiff's witnesses were the keeping in the strong room in which the

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plaintiff's box with the debentures was placed, not only of the boxes of other customers, but also of the before-mentioned valuable property belonging to the bank; the good character of Fletcher, and his leaving the bank in the end of the month of July, 1864; and that after Fletcher left, but before the loss of the plaintiff's debentures was discovered, a rule was made in the bank that two clerks instead of one (as formerly) should go with a customer wishing to examine his box in the strong room. The jury found a verdict for the plaintiff upon an issue as to the delivery of the debentures to be kept by the bank without reward, and also upon the plea of not guilty (which raised the question of negligence), and they assessed the damages at £10,450. The defendant, upon the leave reserved at the trial, moved for and obtained a rule from the Supreme Court to set aside the verdict and to enter a verdict for the defendant, or a judgment of nonsuit. That rule was afterward made absolute, the Chief Justice stating that "in the opinion of the court the defendant was entitled to a verdict, but that as at the trial, when leave to enter a verdict was reserved, there was an understanding that the rule if absolute, should be for a nonsuit, and not to enter a verdict, the rule would be absolute accordingly." In the argument of the appeal the counsel for the appellant, admitting that the bank were gratuitous bailees, and therefore not responsible except for the highest degree of negligence usually styled "gross negligence," insisted that it was a question of fact for the jury whether the bank had been guilty of this species of negligence, and that the judge would not have been justified at the close of the plaintiff's case in withdrawing the question from the jury and directing a nonsuit, and that after the defendant's case had been gone into, and the jury had pronounced a verdict upon all the evidence upon both sides, it was not competent to the court to give a judgment of nonsuit or to do more than to direct a new trial upon the question of negligence. The learned counsel contended that the bank had been guilty of negligence, because there being two iron doors with protecting locks to the strong room where the plaintiff's debentures were, the cashier was permitted to keep both keys. And they urged that the bank by their own act admitted that they had not been sufficiently careful, as after Fletcher left, they made a rule that two clerks should always accompany the customers to the strong room instead of only one, as had previously been the practice. The first question to be considered is, whether the Supreme Court was right in directing a nonsuit to be entered. It was the duty of the court to do what the judge ought to have done at the trial; and if, at the close of the plaintiff's case, there was not evidence upon which the jury could reasonably and properly find a verdict for him, the judge ought to have directed a nonsuit. Formerly it used to be held, that if there were what was called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury. But a course of recent decisions (most of which are referred to in the case of *Ryder v. Wombwell*, L. Rep. 4 Ex. 32; 19 L. T. Rep. N. S. 491), has established a more reasonable rule,—viz., that in every case before the evidence is left to the jury,

there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. If, therefore, the plaintiff's evidence in this case was such that the judge ought to have considered that it fell short of proving the bank to have been guilty of that species of negligence which would render them liable to an action, he ought to have withdrawn the case from the jury, and directed a nonsuit. But the appellant's counsel insisted that, as the defendant at the trial did not rest upon his objection to the sufficiency of the plaintiff's case, but went into evidence of his own, he did it at his peril; and that if he proved any facts which were favorable to the plaintiff, they might be used in answer to the application to the court for a nonsuit, upon the leave reserved at the close of the plaintiff's case. It is unnecessary to determine whether this position is correct or not, because the counsel for the respondent agreed that the appellant's counsel might be at liberty to use in argument any facts which they could extract from the defendant's evidence in support of their case. But it may be convenient to see how the plaintiff's case stood upon his own evidence, before considering whether it was at all improved by any facts obtained from the defendant's witnesses. Did the plaintiff, then, give any evidence of the bank having been guilty of that degree of negligence which renders a gratuitous bailee liable for the loss of property deposited with him? From the time of Lord Holt's celebrated judgment in *Coggs v. Bernard*, 1 Sm. L. Ca. 177, 6th edit., in which he classified and distinguished the different degrees of negligence for which the different kinds of bailees are answerable, the negligence which must be established against a gratuitous bailee has been called "gross negligence." This term has been used from that period, without objection, as a short and convenient mode of describing the degree of responsibility which attaches upon a bailee of this class. At last, Lord Cranworth (then Baron Rolfe), in the case of *Wilson v. Brett*, 11 M. & W. 113 objected to it, saying that he "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet." And this critical observation has been since approved of by other eminent judges. Of course, if intended as a definition, the expression, "gross negligence," wholly fails of its object. But as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully retained as descriptive of that difference, more especially as it has been so long in familiar use, and has been sanctioned by such high authority as Lord Holt and Sir William Jones in his *Essay on the Law of Bailments*. In the case of *Grill v. General Iron Screw Collier Company*, L. Rep. 1 C. P. 612; 14 L. T. Rep. N. S. 715, Willes, J., after agreeing with the dictum of Lord Cranworth, and stating that the same view of the term "gross negligence" was held by the Exchequer Chamber in *Beal v. The South Devon Railway Company*, 8 H. & C. 837; 11 L. T. Rep. N. S. 184, said: "Confusion has arisen from



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regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use." It is hardly correct to say that the Court of Exchequer Chamber in the case referred to adopted the view of Lord Cranworth as to the impropriety of the term "gross negligence." Crompton, J., in delivering the opinion of the court, said: "It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron in the court below, where he says 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them;'" and he added, "for all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence, is gross negligence." M. Smith, J., in the case in which the above-mentioned observations of Willes, J., were made, said: "The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence." The epithet "gross," is certainly not without its significance. The negligence for which, according to Lord Holt, a gratuitous bailee incurs inability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise, corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility. In truth, this difficulty is inherent in the nature of the subject and, though degrees of care are not definable, they are with some approach to certainty distinguishable; and in every case of this description in which the evidence is left to the jury, they must be led by a cautious and discriminating direction of the judge to distinguish, as well as they can, degrees of things which run more or less into each other. It is clear, according to the authorities, that the bank in this case were not bound to more than ordinary care of the deposit intrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs. The case resembles very closely one that was mentioned by the counsel for the respondent, which was decided in the Supreme Judicial Court of Massachusetts, the case of *Foster, et al (Executors), v. The Essex Bank*, 17 Mass. Rep. 478. The plaintiff in that case deposited with the bank for safe custody, a cask containing a quantity of gold doubloons. This was placed with other deposits in a vault in the bank, and the agent of the plaintiff was in the habit of coming to the bank to see that his deposit was safe. There was no evidence how the vault was secured. Whenever the plaintiff gave orders to the bank (which he frequently

did) to deliver some of the gold doubloons deposited, the cask was opened by the cashier or chief clerk, who delivered the doubloons pursuant to the orders. The cashier and chief clerk, both of whom had previously sustained a fair reputation, fraudulently took from the cask doubloons to the amount of 82,000 dollars, with which they absconded. The action was tried upon the general issue, and the jury found a special verdict. The court, after argument, gave judgment for the defendants. The Chief Justice, who delivered the opinion of the court, entered fully in the law of bailments applicable to the case, holding that, "as far as the bank was concerned, the deposit of the gold was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank which could tend to increase its liability beyond the effect of such a contract." "That the bank was answerable only for gross negligence or for fraud, which will make a bailee of any character answerable, and that gross negligence certainly could not be inferred from anything found by the verdict, as the same care was taken of the plaintiff's property as of other deposits, and of the property belonging to the bank itself." And the court held that the bank was not responsible for the fraud or felony of the cashier and clerk, as when they abstracted the plaintiff's gold from the cask they were not acting within the scope of their employment; "and the bank was no more answerable for their act than it would have been if they had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank." Their Lordships entertain no doubt it was the duty of the judge at the close of the plaintiff's case, upon the application of the counsel for the defendant, to have ordered a nonsuit, or if the plaintiff refused to be nonsuited, to have directed the jury to find a verdict for the defendant, as there was an entire failure of evidence of the want of that ordinary care which the bank was bound to bestow upon the plaintiff's deposit. But the judge having refused to nonsuit, the defendant thereupon went into his case and called witnesses, and having done so the counsel for the appellants contend that there being evidence on both sides the question could not be withdrawn from the jury, and that as the judge could not have nonsuited at that stage of the trial it was not competent to the Supreme Court to give a judgment of nonsuit. It is not, however, correct to say that the judge could not have nonsuited the plaintiff after the defendant had entered upon his case, as it was decided in the case of *Davis v. Hardy* (6 B. & C. 225), that the evidence given by a defendant may be used for the purpose of a nonsuit. The defendant's evidence added to the plaintiff's case the important fact that in the strong room in which the plaintiff's debentures were kept, there were, besides the boxes of other customers, bills, securities, and specie, the property of the bank, to a very considerable amount. It may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. But there is no

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case which puts the duty of a bailee of this kind higher than this, that he is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description. This was, in effect the question left to the jury in *Doorman v. Jenkins* (2 A. & E. 256), where Lord Denman told them that "it did not follow from the defendant's having lost his own money at the same time as the plaintiff's that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own, and that the fact relied upon was no answer to the action if they believed that the loss occurred from gross negligence." No one can fairly say that the means employed for the protection of the property of the bank and of the plaintiff were not such as any reasonable man might properly have considered amply sufficient. But the appellant's counsel insisted that the fact appearing for the first time in the defendant's case, that the bank, after Fletcher had abused the confidence reposed in him, had introduced additional precautions to prevent the recurrence of a similar act of dishonesty, amounted to an admission that their former safeguards were not such as prudent men ought to have been satisfied with. This argument goes the length of contending that if a gratuitous depositary does not multiply his precautions, so as not to omit anything which can make the loss of property entrusted to him next to impossible, he is guilty of gross negligence. Their Lordships are clearly of opinion that the plaintiff failed upon his own evidence to prove a case of negligence against the bank, and that the evidence produced by the defendant showed more strongly the absence of any such negligence for which they would have been liable. They will, therefore, recommend to Her Majesty that the judgment appealed from be affirmed, and the appeal dismissed with costs.

*Appeal dismissed.*

### COURT OF EXCHEQUER.

#### HART V. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

*Railway company—Accident by collision—Driver of engine seized with a fit—Pointsman turning engine on to branch line to avoid collision with express train on main line—Collision on branch line—Alteration of siding points subsequently to accident—Evidence of negligence—Number of men on engine—Liability of railway company—Subsequent alteration of rails no evidence of previous negligence.*

At the Miles Platting station on the defendants' main line of railway, a few miles from Manchester, there were sidings leading from the main line of rails to coaling and engine sheds, the points of which sidings were always open on to the main line. On the day in question, an engine had, in accordance with the usual practice, been taken by the servant of the company appointed for that purpose to the coaling shed and been coaled, and was returning slowly therefrom on its way to the engine shed. In the ordinary course of things, the engine would have gone along the siding until it had passed the points of the siding leading to the engine shed, when it would have been reversed and backed over them into that shed; but at the moment that the man in charge of the engine should have reversed its action, he fell down in a fit on the foot-board of the engine, which consequently proceeded on towards the main line. At this same time a down express train from Manchester, and an up express train from Rochdale were approaching the station at full speed, and the pointsman in charge of the points

at the spot seeing the runaway engine, with the man lying on the floor approaching, in order to prevent its getting on to the main line, and coming into collision with either of these express trains, deliberately, as a choice of evils, turned the points so as to send it on to a branch line of railway from Ashton, which formed a junction at this station with the main line, at the platform of which branch line he knew that a train was stopping for tickets to be collected. The consequence was, that the engine ran into the stationary branch train, and the plaintiff, a second class passenger in one of the carriages of that train, received bodily injuries from the collision, for which he sued the company for compensation, on the ground of negligence, first, in not having two men on the engine while coaling, and running it from the coaling to the engine shed; and secondly, in having the points of the sidings so arranged that the engine must necessarily, in case of accident to the driver, pass on to the main line; and the fact of an alteration having since this accident been made, so that a runaway engine would pass on to a supplementary siding leading up to a "dead end," was urged as evidence of their previous negligence in this respect; it being admitted, on all hands, that the pointsman had acted with great presence of mind, and for the best under the circumstances.

A verdict with damages was found for the plaintiff, but upon a rule for a new trial on the ground that there was no evidence of negligence in the defendants fixing them with liability, it was

*Held*, by the Court of Exchequer (Kelly, C.B., and Bramwell, Channell, and Cleasby, B.B.), making the rule absolute, that there was no evidence of negligence in the defendants on which the verdict could be supported. First, there being nothing dangerous or attended with peculiar risk in the operation of coaling the engines, and running them to and from the coaling and engine sheds, and it being an operation usually well performed by one man, the not employing two men to perform it was not negligence in the defendants. Secondly, the arrangement of the sidings having been used for twenty years without accident, the defendants could not be held bound to have foreseen the accident, or be held responsible for it upon its happening, nor was the subsequent alteration of the siding rails evidence of antecedent negligence on their part in that respect.

[21 L. T. Rep., N. S., 261.]

This was an action brought by the plaintiff to recover from the defendants damages in compensation for bodily injuries received by him through the negligence of the defendants whilst the plaintiff was travelling as a passenger upon their line of railway from Ashton to Manchester.

At the trial before BRETT, J., and a common jury, at Liverpool, at the last spring assizes, the following appeared to be the facts of the case:—At the Miles Platting Station, on the defendants' main line of railway, a few miles from Manchester, where the accident happened, there is a junction, at which a branch line of railway leads off to Ashton, the main line running on in a straight line to Rochdale. About 400 or 500 yards from the junction, and on the Manchester side of the station, there is a siding running from a point of the main line to an engine shed, and at about 200 or 300 yards from the said point there is also a branch siding to a coaling shed. A few yards from this same point there is a signal and pointsman's box, at which the pointsman works the points, which are open towards Rochdale, so that an engine running from the siding on to the main line would, unless the points were turned, go on to the up line leading from Rochdale to Manchester; there are also points further on, on the main Rochdale line, by which a train or engine can be turned from the up to the down line, and there is communication between the signal boxes at the various points. The traffic at the station is very great, upwards of 200 passenger trains, besides goods trains, passing the station daily.

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The plaintiff was travelling in a second-class carriage from Ashton to Manchester, and the train by which he was travelling was stopping for the purpose of the Manchester tickets being collected at the Mile-Platting platform of the branch line from Ashton before-mentioned, and some 300 or 400 yards from the spot where the points from the sidings open on to the main line.

The coaling shed before-mentioned is the place where the engines are supplied with coal, and on the 20th October an engine which had just come off a journey had, in accordance with the usual practice in such cases, been given in charge by its driver and stoker to a servant of the company, whose business it was to see to the coaling of the engines. It had been coaled by him at the coaling shed, and was slowly returning therefrom, and in the course of being taken by him from the coaling shed siding to the other siding leading to the engine shed. In the ordinary course of things, the engine after coming from the coaling shed would have gone along the siding, until it had passed the points of the siding leading to the engine shed, when it would have been reversed and backed over them into that shed, but just at the moment when the man in charge of the engine should have reversed its action, he was seized with a fit and fell across the footboard of the engine in a state of insensibility. The consequence was, that the engine, instead of being backed into the engine shed, proceeded onwards upon the siding towards the points opening on to the main line at the moment that a down express train from Manchester, and an up express train from Rochdale were approaching the station at full speed on the up and down main lines. At this juncture, the pointsman in charge of the signal box and points at the part of the line, seeing the engine, with the man lying across the footboard, approaching the main line of rails, and having but an instant in which to decide what to do, came to the conclusion that the least hazardous and dangerous course to pursue, was to turn the points of the main line, so as to send the engine on to the Ashton branch line, knowing that if any train might happen to be there it would be either slackening its speed, or at a stand still, whereas if he had let it go upon either of the main lines of rail it would infallibly have come into collision with one or the other of the before-mentioned express trains travelling at top speed, when the consequences would in all probability have been far more disastrous. Under these circumstances, therefore, the pointsman deliberately turned the runaway engine on to the Ashton branch. The result of his so doing was, that the engine ran on until it reached the spot where the train in which the plaintiff was sitting was standing as before-mentioned, and, coming into collision with it, caused the injuries to the plaintiff of which he complained in his declaration.

It appeared too that, since the accident, the defendants had altered the siding in question, so that on leaving the coaling shed the engines now ran, not on the same line, but on a supplementary siding, leading to a "dead end," where a runaway engine would be brought to a standstill.

The learned judge told the jury that the liability of the defendants depended on the negligence of their servants being proved, and that it

was negligence to do that which, under the circumstances, was dangerous, or to omit to do what ought to be done, but it was not negligence simply to omit to do the best under the circumstances. The question was for the jury; was there any negligence in the pointsman, or was there negligence in the defendants having only one man to coal the engine? The man had done it for years, and, but for his unforeseen and unexpected illness it would have been safely done on this occasion. The company did not know, nor was it proved, that he was liable to fits. Then as to the siding, no doubt it had been altered since the accident, but it was not negligent in them not to guard beforehand against an accident which could not reasonably have been foreseen.

The jury found a verdict for the plaintiff for £110 damages, and a rule was afterwards moved for and obtained by *Manisty*, Q.C., on the part of the defendants, for a new trial, on the ground that there was no evidence of negligence in the defendants to go to the jury, upon which liability could be fixed on them, and also that the verdict was against the weight of the evidence, and now

*Holker*, Q.C., and *McConnell*, for the plaintiff, showed cause against it, and contended that the verdict of the jury establishing negligence in the defendants was well warranted by the facts and evidence of the case. We do not complain of the act done by the pointsman, for probably he did the best thing which under the circumstances of the moment he could do, for had the engine been allowed to proceed as it was going it would have gone on to the main Rochdale line and came into collision with the Yorkshire express, and had he turned it on to the other main line of rail a like result would have followed with the Manchester express. The jury, however, considered there was negligence in the company, and the plaintiff says the negligence consisted in this; first, that there should have been two men employed on the engine at the coaling process. A man engaged in such a job is very liable to become affected by the sulphurous vapour arising from the burning coal. By one of their printed regulations they seem to provide against the very event of the sudden illness of a driver of an engine, by always having two men attached to the engine on a journey, and it cannot be contended that, if two men are necessary on an engine when running on the main line, they are not equally so when travelling up and down a siding, where if the engine runs away it must get upon the main line. [BRAMWELL, B. — You might almost as reasonably argue that there ought to be three men on the engine in case two should fall ill at the same moment.] The second point of negligence was in the arrangement of the siding rails, the points of which before the accident stood always open on to the main line, but which have been altered since by adding a small supplementary siding, so that an engine now running away from the coaling shed would not get upon the main line as it would previously have done, but would run on until brought up at a "dead end." This obviously shows what the defendants should have done before; the precaution is an obvious one, and the defendants as public carriers were bound to use and adopt every possible reasona-

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ble precaution against accident, and especially at so dangerous and much frequented a part of their line. [BRANWELL, B.—It is a mistake to say that because the company are wiser now they were foolish before. KELLY, C.B.—You would say it was the duty of the railway company to anticipate every possible form of accident.] No doubt Brett, J., took a strong view at the trial against the plaintiff, but we contend that it was more, indeed that it was peculiarly, a question for them, and that the verdict was right. They cited *Christie v. Griggs*, 2 Camp. 79, and the observations of Sir J. Mansfield C.J.

*Manisty*, Q.C., and *Edwards*, for the defendants, *contra*, were not called on to support their rule.

KELLY, C.B.—I am of opinion that the defendants' rule in this case must be made absolute. The jury, no doubt, have found that the accident to the plaintiff was caused by negligence on the part of the railway company, but I think that there was no negligence at all, and I must confess that I see no evidence of any. It has been contended on the part of the plaintiff that there ought always to be two men on the engine, not only, as is the case when it is being used to pull or propel a train of carriages on the main line, but on every occasion whenever an engine is moved about on a line of rails, whether by itself or attached to carriages, so that if one of the men should happen to drop down dead, the other may be at hand at once to take his place, and thus the probability of such an accident as the present happening may be avoided. But, if it be that that is a necessary regulation in the present case, I see no reason why it should not be a necessary one in every imaginable case where a man is employed in any duty whatever about a railway. But we must use our common sense in the matter. Now, in the present instance there was nothing dangerous or attended with any peculiar risk in the duty upon which the man was occupied, although the learned counsel for the plaintiff assumed, as a matter of course, that it was an occupation very liable to produce a fit of some kind. But surely it was never heard that sickness of any kind was ever produced by it. If then this be an operation usually conducted by one man, and without any ill results arising therefrom, it would surely be a very strong thing to say that the not employing two men to perform the operation was negligence on the part of the company. There is, I think, nothing in that contention of the plaintiff. But then it has been suggested that the siding leading to the coal-shed should be so constructed that what is called a "runaway engine" could not by possibility get upon the main line. But if it must be so in one case it must be so in another. No doubt the company have altered the mode of constructing the sidings. But it is a new mode of construction, and I see no reason for saying that there is not as much danger from the one way as from the other. It is enough to say that it is new. The old plan had been adopted and used by the company for twenty years, and no accident had ever before happened; and it appears to me that it would be most unreasonable to suppose that the company could or ought to have foreseen this accident, or to hold them responsible for it upon its happening.

BRANWELL, B.—I am entirely of the same opinion, and am quite satisfied that this rule must be made absolute. I agree with the Lord Chief Baron and my brother Brett, and confess that I cannot see any evidence of negligence in the matter. Although I have no desire to occupy time unnecessarily, I think that there are matters of considerable importance involved in this particular case. One of them is, that people do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before. Moreover, I think that in such a case as the present, an expert, if I may so say, some scientific medical man, practically acquainted with the nature of the duty to be performed by the engine man here should have been called to inform the minds of the court and the jury as to the duty in question, and whether or not it was a dangerous one, and likely to be productive through the fumes arising from the burning coal of any attack in the nature of a fit, and that it should not have been left to the bare statement of the learned counsel. Here counsel on the one side assert that it was a very dangerous occupation, and the counsel on the other side assert the contrary. Who is to decide between them? But suppose that we were to hold that this verdict is right, and the Lancashire and Yorkshire Railway Company were to do, what I think they would not be blamable for doing, viz., to publish a new and increased tariff of their rates of charge, and to say, "Whereas the Court of Exchequer have laid it down as law that two men are necessary on every engine, under all possible or conceivable circumstances, where only one man was accustomed to be employed before, therefore we have raised our fares to such and such prices, to meet the extra expense imposed on and incurred by us in complying with the decision of the court," what, I wonder, would people think of the Court of Exchequer then? But there is another point to be noticed in this case. Here it was owing to the voluntary and deliberate act of the pointman himself that the engine went in the direction in which it did go. Mr. Holker even, on the part of the plaintiff, says that he does not blame the man for that; on the contrary, he really thinks the man exercised a wise discretion in doing what he did, and that I think is quite true. But, nevertheless, the man did it; it was his own voluntary and wilful act; and if the truth must be spoken, I cannot see what answer he would have had if an action had been brought against him. He might say, and no doubt with extreme truth, "It is a very hard case, I did the best I could, and my duty," and no doubt it would be a very hard case; but the plaintiff might also truly say, "I cannot help that, you ran over me, and hurt me very seriously." Take the case of a man driving a carriage through a street, and, to avoid a certain accident, he turns a little out of his course and drives over A. and inflicts upon him serious injuries, surely A. might say to him, "Why did you select me as the object to be driven over?" Then it is said that people are responsible for

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the acts of their servants. Here I doubt very much whether the pointsman had not the authority of the company for what he did, for he was not only doing the best he could to avoid an accident, but the best probably for the property of his employers, as the result of a collision on the main line with the coming express train then just due, had the engine been permitted to pursue its course on that line, would, in all human probability, have been attended with infinitely more serious results. I have thought it right to mention these points, for peradventure the case may go farther, and I think there is a point upon it in the plaintiff's favour, though it has not been discussed. But the present rule must be made absolute, on the ground that the verdict is against, or rather without, evidence.

CHANNELL, B.—I am of opinion that this rule should be made absolute, on the ground that there was no evidence on which the verdict can be supported. I think the pointsman was justified in turning the points in the way he did, and that the railway company are not bound to warrant that the men employed by them on their engines shall be free from attacks of illness. With regard to the branch siding and its alteration since the accident, it is not because the defendants have become wiser and done something subsequently to the accident that their doing so is to be evidence of any antecedent negligence on their part in that respect.

CLEASBY, B.—I am of the same opinion. In all these cases we are bound to look at the proximate cause of the accident, and, if that is found, we cannot in general go beyond it. No doubt it is a very hard case for the plaintiff, sitting quietly and lawfully as he was in his proper place in the railway carriage, that the points should be deliberately turned so as to send the engine down straight upon him; but so it is. That act was the voluntary act of the pointsman himself, and was, as is admitted on all hands, the best thing that could be done under the circumstances; and I have grave doubts whether the company could be held responsible for an injury proximately caused by such an act of their servant done under such circumstances. As to the other question, namely, that the company have, by subsequently altering the sidings, made some evidence against themselves of previous negligence, I agree with my Lord and my learned brother that that is not so.

• Rule absolute.

### CHANCERY.

#### MARSHALL V. ROSS.

*Trade mark—Word "patent"—Definition of.*

The word "patent" may be used, in certain cases, although the party using it has not, in fact, obtained a patent for the manufacture of the article so said to be patented.

[21 L. T. Rep. 260.]

This was a motion in the terms of the prayer of the plaintiff's bill, to restrain the defendant, James Ross, a shipping agent, from removing or parting with certain packages of thread, in wrappers, bearing labels in imitation of the plaintiff's labels. The thread had been manufactured in Belgium, and had been consigned by the manu-

facturers, Messrs. Dietz and Company, to the defendant Ross in this country, for the purpose of being shipped by him to Australia. The label which the plaintiff had adopted contained the words "Marshall and Co., Shrewsbury." "Patent Thread."

The labels of the defendants were worded, "Marchal; Schrewsbury." "Patent Thread." It appeared that the thread manufactured by the plaintiff was not, in fact, patented; but it was alleged and proved that the word "patent" was so used to designate a certain class of thread well known in the trade; that that term had for many years past been used by manufacturers to distinguish it from thread of a general class.

*E. E. Key, Q.C., and A. G. Nicolson.* in support of the motion, contended that it was an evident infringement of the plaintiff's trade mark, which the word "patent" implied; was deceptive in its character, and caused injury to the plaintiffs.

*Davey, contra.* urged that the defendant was in the present case only a simple consignee, and could not be presumed to know anything of the label in question as an imitation of the plaintiff's label. The plaintiffs, in fact, had no right to make use of the word "patent" in reference to the character of their thread, when no patent had ever been granted in respect of it, and they therefore could not have the relief by injunction as prayed.

The VICE-CHANCELLOR said, that the word "patent" might be used in such a way as not to deceive anyone, or cause a belief that the goods so called were protected by a patent. He instanced the case of "patent leather boots." In the present case the term "patent thread" had been so long used in this particular trade that it might be said to have become a word of "art." He did not consider that there had been any such misrepresentation by the plaintiffs in using the term to prevent them from having it protected by the injunction prayed for. There must therefore be an order for the injunction as prayed.

*Order accordingly.*

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## UNITED STATES REPORTS.

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### SUPREME COURT, UNITED STATES.

[From the *Pittsburgh Legal Journal.*]

#### THORNINGTON V. SMITH & HARTLEY

The rights and obligations of a belligerent were conceded to the government of the Confederate States in its military character from motives of humanity and expediency by the United States. To the extent of actual supremacy in all matters of government within its military lines the power of the insurgent government was unquestioned. Such supremacy made civil obedience to its authority not only a necessity, but a duty.

Confederate notes issued by such authority and used in nearly all business transactions by many millions of people, while as contracts in themselves in the event of unsuccessful revolution they were nullities, must be regarded as a currency imposed on the community by irresistible force.

Contracts stipulating for payment in that currency cannot be regarded as made in aid of the insurrection; they are transactions in the ordinary course of civil society, and are without blame except when proved to have been entered into with actual intent to further the insurrection.

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Such contracts should be enforced in the courts of the United States after the restoration of peace, to the extent of their first obligation.

The party entitled to be paid in these Confederate dollars can only receive their actual value at the time and place of the contract in lawful money of the United States.

CHASE, C. J.—This is a bill in equity for the enforcement of a vendor's lien.

It is not denied that Smith & Hartley purchased Thorington's land, or that they executed to him their promissory note for part of the purchase money, as set forth in his bill; or that, if there was nothing more in the case, he would be entitled to a decree for the amount of the note and interest, and for the sale of the land to satisfy the debt. But it is insisted, by the way of defence, that the negotiation for the purchase of the land took place, and that the note in controversy, payable one day after date, was made at Montgomery, in the state of Alabama, where all the parties resided in November, 1864, at which time the authority of the United States was excluded from that portion of the State, and the only currency in use consisted of Confederate Treasury notes, issued and put in circulation by persons exercising the ruling power of the States in rebellion, known as the Confederate government.

It was also insisted that the land purchased was worth no more than three thousand dollars in lawful money; that the contract price was forty-five thousand dollars; that this price, by the agreement of the parties, was to be paid in Confederate notes; that thirty-five thousand dollars were actually paid in these notes, and that the note given for the remaining ten thousand dollars was to be discharged in the same manner; and it is claimed on this state of facts, that the vendor is entitled to no relief in a court of the United States; and this claim was sustained in the court below, and the bill was dismissed. The questions before us on appeal are these: First, can a contract for the payment of Confederate notes, made during the late rebellion, between parties residing within the so called Confederate States, be enforced at all in the courts of the United States? Second, can evidence be received to prove that a promise expressed to be for the payment of dollars was, in fact, for the payment of any other than lawful money of the United States? Does the evidence in the record establish the fact that the note for ten thousand dollars was to be paid, by agreement of the parties, in Confederate notes?

The first question is by no means free from difficulty. It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the Government of the United States by insurrectionary force. Nor is it a doubtful principle of law that no contract made in aid of such an attempt can be enforced through the courts of the country whose government is thus assailed. But was the contract of the parties to this suit a contract of that character—can it be fairly described as a contract in aid of the rebellion? In examining this question, the state of that part of the country in which it was made must be considered. It is familiar history that early in 1861 the authorities of seven States, supported, as was alleged, by popular majorities, combined for the overthrow of the National Union, and for the estab-

lishment within its boundaries of a separate and independent confederation. A governmental organization representing these States was established at Montgomery, in Alabama, first under a provisional constitution, and afterwards under a constitution intended to be permanent. In the course of a few months four other States acceded to this confederation, and the seat of the central authority was transferred to Richmond, in Virginia. It was by the central authority thus organized, and under its direction, that the civil war was carried on upon a vast scale against the Government of the United States. For more than four years its power was recognized as supreme in nearly the whole of the territory of the States confederated. It was the actual government of all the insurgent States, except those portions of them protected from its control by the presence of the armed forces of the national government. What was the precise character of this government in contemplation of law? It is difficult to define it with exactness. Any definition that may be given may not improbably be found to require limitation and qualification. But the general principles of law relating to *de facto* government will, we think, conduct us to a conclusion sufficiently accurate. There are several degrees of what is called *de facto* government. Such a government, in its highest degrees, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their places, and so becomes the actual government of a country. The distinguishing characteristic of such a government is that adherents to it in war against the government *de jure* do not incur the penalties of treason; and, under certain limitations, obligations assumed by it in behalf of the country or otherwise will, in general, be respected by the government *de jure* when restored.

Examples of this description of government *de facto* are found in English history. The statute 11, Henry VII., C. I. (Brit. Stat. at large), relieves from penalties for treason all persons who, in defence of the King for the time being, wage war against those who endeavor to subvert his authority by force of arms, though warranted in so doing by the lawful monarch (4 Bl. Comm. 77).

But this is where the usurper obtains actual possession of the royal authority of the kingdom; not when he has succeeded only in establishing his power over particular localities. Being in such possession, allegiance is due to him as king *de facto*.

Another example may be found in the government of England under the Commonwealth, first by Parliament and afterwards by Cromwell as Protector. It was not, in the contemplation of law, a government *de jure*, but it was a government *de facto* in the absolute sense. It made laws, treaties, and conquests, which remain the laws, treaties and conquests of England after the restoration. The better opinion is that acts done in obedience to this government could not be justly regarded as treasonable, though in hostility to the king *de jure*. Such acts were protected from criminal prosecution by the spirit, if not the letter, of the statute of Henry the Seventh.

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It was held otherwise by the judges by whom Sir Henry Vane was tried for treason (8 State Trials, 119) in the year following the restoration, but such a judgment in such a time has little authority.

It is very certain that the Confederate Government was never acknowledged by the United States as a *de facto* government in this sense, nor was it acknowledged as such by other powers. No treaties were made by it. No obligations of a national character were created by it binding after its dissolution, on the States which it represented on the national government. From a very early period of the war to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

But there is another description of government called by publicists a government *de facto*, but which might perhaps be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1) that its existence is maintained by active military power within the territories and against the rightful authority for established and lawful government; and (2) that while it exists it must necessarily be obeyed in civil matters by private citizens, who by acts of obedience rendered in submission to such force, do not become responsible as wrongdoers for these acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions; they are usually administered directly by military authority but they may be administered also by civil authority, supported more or less by military force.

One example of this sort of government is found in the case of Castine, in Maine, reduced to a British possession (the War of 1812). From the 1st of September, 1814, to the ratification of the treaty of peace in 1815, according to the judgment of the court in the *United States v. Rice* (4 Wheat., 253), "the British government exercised all civil and military authority over the place." The authority of the United States over the territory was suspended, and the laws of the United States could no longer be rightfully enforced then or be obligatory upon the inhabitants who remained and submitted to the conqueror. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws and such only, as it chose to recognize and impose. It is not to be inferred from this that the obligations of the people of Castine, as citizens of the United States, were abrogated. They were suspended merely by the presence, and only during the presence, of the paramount force. A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. It was determined by this court, in *Fleming v. Page* (9 How., 614), that although Tampico did not become a part of the United States in consequence of that occupation, still having come, together with the whole State of Tamaulipas, of which it was part, into the exclusive possession of the national forces, it must be regarded and respected by other nations as the territory of the United States. These were cases of temporary possession of territory by lawful and regular governments at war with the coun-

try of which the territory so possessed was part. The central government established for the insurgent states differed from the temporary governments at Castine and Tampico in the circumstance that its authority did not originate in lawful acts of regular war; but it was not on that account less active or less supreme, and we think that it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it in its military character, very soon after the war began, from motives of humanity and expediency, by the United States. The whole territory controlled by it was thereafter held to be the enemy's territory, and the inhabitants of that territory were held in most respects for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy would not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made civil obedience to its authority not only a necessity but a duty. Without such obedience civil order was impossible. It was by this government exercising its power through an immense territory that the Confederate notes were issued early in the war, and these notes in a short time, became almost exclusively the currency of the insurgent States. As contracts in themselves, in the contingency of successful revolution, these notes were nullities, for except in that event there could be no payer. They bore, indeed, this character upon their face, for they were made payable only "after a ratification of a treaty of peace between the Confederate States and the United States of America." While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency imposed on the community by irresistible force. It seems to follow as a necessary consequence from the actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and the necessity of civil obedience on the part of all who remained in it, that this currency must be regarded in the courts of law in the same light as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in that currency cannot be regarded as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relation to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further the invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their first obligation. The first question, therefore, must receive an affirmative answer.

The second question, whether evidence can be

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received to prove that a promise made in one of the insurgent States, and expressed to be for the payment of dollars, without qualifying words, was, in fact, made for the payment of any other than lawful dollars of the United States, is next to be considered. It is quite clear that a contract to pay dollars made between citizens of any State of the Union maintaining its constitutional relations with the national government is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence. But it is equally clear, if in any other country coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that in a suit upon a contract to pay dollars made in that country, evidence would be admitted to prove what kind of dollars was intended; and, if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States.

Such evidence does not modify or alter the contract. It simply explains an ambiguity which, under the general rules of evidence may be removed by parol evidence. We have already seen that the people of the insurgent States, under this Confederate Government, were, in legal contemplation, substantially in the same condition as inhabitants of districts of a country occupied and controlled by an invading belligerent. The rules which would apply to the former case would apply to the latter, and, as in the former case, the people must be regarded as subjects of a foreign power, and contracts among them be interpreted and enforced with reference to the laws imposed by the conqueror, so in the latter case the inhabitants must be regarded as under the authority of the insurgent belligerents, actually established as the government of the country; and contracts made with them must be interpreted and inferred with reference to the condition of things created by the acts of the governing power.

It is said, indeed, that under the insurgent government the word dollars had the same meaning as under the government of the United States; that the Confederate notes were never made a legal tender; and, therefore, that no evidence can be received to show any other meaning of the word when used in a contract.

But it must be remembered that the whole condition of things in the insurgent States was matter of fact, rather than matter of law; and as matter of fact these notes, payable at a future and contingent day, which has not arrived, and can never arrive, were forced into circulation as dollars, if not directly by the legislation, yet indirectly, and quite as effectively, by the acts of the insurgent government. Considered in themselves, and in the light of subsequent events, these notes had no real value, but they were made current as value by irresistible force; they were the only measure of value which this people had, and their use was a matter of almost absolute necessity, and this gave them a sort of a value, insignificant and precarious enough, it is true, but always having a sufficient definite relation to gold and silver, the universal measures of value, so that it was easy to ascertain how much gold and silver was the real equivalent of a sum expressed in the currency. In the

light of these facts it seems hardly less than absurd to say that these dollars must be regarded as identical in kind and value with the dollars which constitute the money of the United States. We cannot shut our eyes to the fact that they were essentially different in both respects, and it seems to us that no rule of evidence, properly understood, requires us to refuse, under the circumstances, to admit proof of the sense in which the word dollar was actually used in the contract before us.

Our answer to the second question is, therefore, also in the affirmative. We are clearly of the opinion that such evidence must be received in respect to such contracts in order that justice may be done between the parties, and that the party entitled to be paid in these Confederate dollars can only receive their actual value at the time and place of the contract in lawful money of the United States. We do not think it necessary to go into a detailed examination of the evidence in the record in order to vindicate our answer to the third question. It is enough to say that it has left no doubt in our minds that the note for \$10,000, to enforce payment of which suit was brought in the Circuit Court, was to be paid by agreement in Confederate notes. It follows that the judgment of the Circuit Court must be reversed and the cause remanded for a new trial, in conformity with the opinion.

#### COYNE ET AL. V. SOUTHER ET AL.

A mortgagee or purchaser at sheriff's sale, is not bound to look beyond the judgment docket. All entries thereon are supposed to be properly made by authority. A defective entry of judgment or unauthorized entry of satisfaction, renders the prothonotary liable to any party injured.

Error to the Court of Common Pleas of Elk county.

Opinion by SHARSWOOD, J.

It is very important that bidders at sheriffs' sales should feel well assured as to whether they are offering to buy a clear or an incumbered title. It is well known that the law as to them is *caveat emptor*. As far as possible, the rules upon the subject should be so clear and intelligible as to preclude mistake if due diligence be used. In regard to the lien of judgments, the judgment docket has been provided, which as to purchasers and subsequent incumbrancers, is intended to afford them certain information. It is the creditors duty to see that his judgment is properly entered thereon; and if there is any mistake, the remedy of the party aggrieved is against the prothonotary. Hence, as has been held, if the entry is in a wrong name, so that those searching may be misled; or if it is wrongly described as to amount, or in any other material particular, third parties will always be protected in acting on the faith of it. There are few points in which the cases are more clear and consistent: *Blair v. Patterson*, 8 W. & S. 288; *Mehaffy's Appeal*, 7 W. & S. 200; *Wood v. Reynolds*, *Ibid.* 406; *Mann's Appeal*, 1 Barr, 24; *Hance's Appeal*, *Ibid.* 408; *Ridgway, Budd & Co.'s Appeal*, 8 Harris, 177; *Goepp v. Gardiner*, 11 Casey, 180. It is said, however, that the prothonotary had no power to mark the judgment satisfied on the docket; that the mortgagee was bound to look further, and



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ascertain whether it has been so marked properly; in other words, whether the entry was true. The argument would have great force, if the prothonotary, in no case, had authority to enter satisfaction of a judgment on the judgment docket. But the prothonotary has such authority. Not to mention the Act of April 11, 1856, Pamph. L. 804, it will be sufficient to refer to the provision of the Act, entitled "An Act relating to the satisfaction of judgments in courts of record in this commonwealth," passed March 27th, 1865 (Pamph. L. 52), because it has a more direct application to the case before us. It provides, that when a judgment has been entered in any court of record, "and it shall appear, by the production of the record, that the same has been fully paid, under or by virtue of an execution or executions issued thereon, and satisfaction has not been entered upon the judgment index or judgment docket of said court, it shall be the duty of the Court \* \* \* to direct the prothonotary to enter satisfaction upon the judgment index or judgment docket, or the record thereof." Now, if there had been an order of the Court pursuant to the provisions of this Act, no one can entertain a doubt that the entry upon the judgment index or docket by the prothonotary, just as the entry was made here "Satisfied on fi. fa.," would have been perfectly regular and conclusive as to all third persons, to whom the judgment itself, regularly docketed, was constructive notice, and who, therefore, were bound to search. Finding the judgment marked "satisfied on fi. fa.," they would have a right to conclude that it was so marked by the order of the Court. It would not be incumbent on them to search further to ascertain whether there was any record of such an order. If false, and made without authority, the prothonotary was responsible to whatever party might be injured thereby. The common presumption in favor of the lawfulness and regularity of the acts of a public officer applies here in all its force, *omnia presumuntur rite esse acta*. It is especially necessary that the judicial records of the country should have the benefit of this presumption in favor of those who are entrusted with the duty of making them up. To hold the contrary, would be in the teeth of the familiar principle, that a record imports on its face absolute verity; otherwise, the Act of Assembly of March 29th, 1827, sect. 8, (Pamph. L. 165), which requires the prothonotary of every Court of Common Pleas to keep a docket, to be called the judgment docket, instead of a convenience and security to the community, would prove a snare. It is manifest, as Judge Kennedy has remarked, that the great object of having this docket is to promote the facility and certainty of ascertaining whether there are judgments against a particular individual, and what are their amounts: *Bear v. Patterson*, 3 W. & S. 237. Now it will not be pretended, that a person wishing to purchase, and desirous to know how much he may safely bid, who finds on the docket a judgment prior to a mortgage, is obliged to look further, and assure himself that it is in fact a judgment entered by the Court or by its authority; neither then ought a mortgagee or subsequent incumbrancer, who is equally interested in determining how to bid, in order to protect himself, when he finds an entry of satisfaction apparently

regular, bound to go further and inquire whether it was made by order of the Court. This disposes of the first and second specifications of error, and renders any consideration of the third unnecessary.

The fourth error assigned is in these words: In rejecting the testimony of J. L. Blakely, Esq., embraced in the offer of defendants below, which is the ground of the bill of exceptions sealed for defendants. This error is not assigned according to the eighth rule adopted at Pillsburg, Sept. 6th, 1852, 6 Harris, 578. It should, therefore, in strictness, "be held the same as none." The offer, however, was rightly rejected. It was as follows: defendant offers to prove by this witness that he gave notice to Mr. Souther, one of the mortgagees, on the day when the rule (that is the rule to show cause why the entry of satisfaction should not be stricken off) was applied for of such application, and that the judgment was in fact paid. Let us see in what position the mortgagee would be placed if he was bound to pay any attention to such a notice. If he assumes that the judgment was not paid, and that of course the lien of his mortgage would be divested, he must bid at least to the full amount of the prior judgment and costs, and as much more as he chooses, so as to cover his mortgage, and if the property is knocked down to him, he must pay the money to the sheriff. If, when the fund comes to be distributed, it should be proved that the entry was right and the judgment paid and satisfied, then he must hold subject to his own mortgage, which would of course be merged, and the whole fund would be applied to satisfy subsequent incumbrances, or go the defendant. In other words, he would lose the whole amount of his bid. Between two stools he must fall to the ground. The position of the mortgagee is peculiar in this, that he must decide at the peril of loss. But if such a notice were publicly given at the time of sale, and it was to be held that bidders would be affected by it, though in the face of the record, would any man of ordinary prudence be willing to bid a fair price when the danger of loss would be so great, and at best, he would only be buying a lawsuit? The cases cited do not sustain this assignment. In the *York Bank's Appeal*, 12 Casey, 458, it was held, that if a subsequent incumbrancer have actual notice of a judgment defectively entered on the judgment docket before his rights attach, it is equivalent to the constructive notice of the prescribed record. That is certainly an entirely different case from this. The incumbrancer having such notice, has a right to refuse to give credit to the debtor. He need not encounter the risk. To the same effect is *Stephen's Executor's Appeal*, 2 Wright, 4. In *Mayaw v. Gurrell*, 1 Casey, 819, it is true that Mr. Justice Knox, in delivering the opinion of the Court, said, "as the record showed the Pearson judgment, at the time of the sheriff's sale, to be an existing lien equal in point of time with the mortgage, and as there was no evidence tending to prove notice of its entire payment to the purchasers, the Court of Common Pleas properly held that the estate sold passed into the hands of the sheriff's vendees discharged from the mortgage lien." But that was a mere extra-judicial dictum. There was no evidence of notice in the case, and of course, the question,

## DIGEST OF QUEBEC REPORTS—REVIEWS.

whether it would have made a difference, did not arise.

*Judgment affirmed.*

—*Philadelphia Legal Intelligencer.*

## DIGEST.

## DIGEST OF CASES REPORTED IN THE PROVINCE OF QUEBEC.

## ACCIDENT.

*Held*, that in an action for damages (under C. S. C. Cap. 78) for the death of a relative killed by accident, the relationship must be established by legal proof, and special damages must be alleged.—*Francois Provost et ux. v. William Jackson et al.*, 13 L. C. Jur. 170.

## JOINT STOCK COMPANY.

*Held*, 1. That subscription for stock in a Railway Company may be conditional.

2. That until the fulfilment of the condition imposed, no action at law would lie in favour of the Railway Company as against the subscriber.—*William H. Rodgers et al v. Francois Laurin*, 18 L. C. Jur. 175.

## CORPORATIONS.

*Held*, That by the laws of the Province of Quebec, Corporations are under a disability to acquire lands without the permission of the Crown or authority of the legislature, and therefore a foreign corporation has no right to hold lands in the Province, without such permission or authority.—*The Chaudière Gold Mining Co. v. Desbarats et al.*, 13 L. C. Jur. 182.

## SERVICE OF PROCESS.

*Held*, That service of a writ upon the clerk of the Recorder's Court at his office attached to the Court, during office hours, and whilst he is engaged in his official duties, but not *à l'audience*, is a valid service.—*Wilson v. Ibbotson*, 18 L. C. Jur. 186.

## CRIMINAL LAW.

*Held*, That an indictment signed by an advocate prosecuting for the Crown and as representing the Attorney-general for the Province of Quebec, and not as representing the Minister of Justice of the Dominion, is valid.—*Regina v. John Downey*, 18 L. C. Jur. 193.

## REVIEWS.

HARRISON'S COMMON LAW PROCEDURE ACT. 2nd edition. Toronto: Copp, Clark & Co.

The third number brings this work as published, down to section 204 of the Common Law Procedure Act. Great care is evidently being taken with this most valuable work, so as to make it as correct and reliable as possible. We shall be glad to have it complete. The necessity for it is more apparent with every page that is published.

THE INVESTIGATION OF TITLES TO ESTATES IN FEE SIMPLE, by Thomas Wardlaw Taylor, M. A., Barrister-at-Law, Referee of Titles, author of "Chancery Statutes and Orders," &c. Toronto: Adam, Stevenson & Co., Law Publishers, King Street East, 1869.

We are in receipt of this book, but must defer further notice of it until next month.

LAW MAGAZINE AND LAW REVIEW. November, 1869. London: Butterworths.

The articles for this quarter are the Penal Code of New York; on Primogeniture; Foreign Debtors in England; Imprisonment for Debt; Suggestions for the Irish Law Bill; on the Turnpike System; on Reform in the Law of Patents; Naturalization and Allegiance; Rights of Colonial Legislatures; State Appropriations of Railways, &c.

AMERICAN LAW REVIEW. October, 1869. Boston: Little, Brown & Co.

This number contains articles on Government Contracts; The Senatorial Term; the Alabama Claims (which we shall reprint). The leading case in England as to the extent of the Liability of Common Carriers of Passengers, is reprinted from the Law Times Reports with a note by the editors, referring to some American decisions on the same subject. Then follows the Digest of the English Law Reports, Selected Digest of State Reports, &c. This publication is a mine of wealth to the American lawyer, and much that it contains is almost of equal interest to us. With the October number was published an index to Vols. I. II. and III. of the Review, with a Table of Cases. This will largely increase the value of the work.

## REVIEWS—APPOINTMENTS TO OFFICE.

**THE CANADIAN ILLUSTRATED NEWS.** Montreal: George Desbarats.

This is as creditable a pictorial as most publications, and we wish it entire success. Much improvement is manifest in the engravings since it was commenced, and we have no doubt that if a liberal encouragement is given to the proprietor and publisher, he will make greater efforts to ensure success. The reading matter is very good; it seems to be got up in good taste, and in this it is a marked contrast to the filthy rubbish that comes from the South of us, in the shape of pictorial newspapers.

**UNITED STATES JUDICIAL SYSTEM—RECENT CHANGE.**—By an act passed at the recent session of Congress the Supreme Court is to consist hereafter of nine judges, six of whom shall be a quorum. The act also provides for the appointment of a circuit judge in each circuit, with the same powers as the judges of the Supreme Court now have on circuit. The Circuit Court is to be held by the judge of the Supreme Court assigned to the circuit, or the circuit judge, or the judge of the District Court, or by any two of them sitting together. We do not perceive that the jurisdiction of the Circuit Court is in anywise affected, the sole purpose of this part of the act being apparently to relieve the judges of the Supreme Court from the pressure of their present circuit duty.

But the feature of the act which attracts special attention is a clause providing that "any judge of any court of the United States who shall, after having attained the age of seventy years, and served for the term of ten years, resign his office, shall thereafter during the rest of his natural life, receive the same salary which was by law payable to him at the time of his resignation." This we believe is the first provision ever made in the United States for a retiring pension for those who have devoted themselves to the public service. Regarding it as we do, as a decided step forward in civilization and good government, we trust that it may be a permanent portion of our judicial system.—*American Law Register.*

**THE HOUSE OF LORDS.**—The removal of Lord Stanley to the House of Lords will add to the debating power and statesmanship of an assembly which is already unrivalled for the eloquence and administrative capacity of its members. The politician will be struck with the appearance of the 15th Earl Derby, the Marquis of Salisbury, and Lord Cairns on the Opposition benches in the Lords. All these are in the foremost rank as Parliamentarians and administrators. On the Ministerial side are the veteran Earl Russell, the accomplished tactician Earl Granville, the ripe diplomatist Lord Clarendon, and the Duke of Argyll. Earl Carnarvon, Earl Grey, Bishop Magee, and many others, are noted for their legislative ability or their oratory. Lord Cairns, Westbury, Penzance, Hatherly and Romilly constitute a legal junta of unsurpassed brilliancy.

Shall we deplore or rejoice in our hereditary and legal system which crowds the House of Lords with men of pre-eminent talent? It depends upon whether we utilize the force in the Lords or suffer it to lie waste. In the Lords there are some of the first and best men in the country, ready and anxious to devote themselves to the service of the country, and all that we have to do is to divide the business between the two Houses, which may be done without in the least interfering with the real or assumed privileges of the Commons. If the recommendations of the Select Committee are acted upon the Lords will not be idle; the arrears of business will be cleared off; important measures such as the Irish Church Bill and the Irish Land Bill will not stop all other legislation; and the great ability in the Lords will not be lost to the country, but on the contrary will be turned to excellent account.—*Law Journal.*

John Scott, after his great argument in *Ackroyd v. Smithson*, became a favorite with Lord Thurlow. On one occasion, after Richard Pepper Arden, afterward Lord Alvanley, whom Thurlow disliked exceedingly, made a very able argument before him, Mr. Scott rose to address the court on the same side, and his Lordship said, "Mr. Scott, I am glad to find that you are engaged in this case for I now stand some chance of knowing something about it."—*Bench and Bar.*

One day Lord Alvanley, Master of the Rolls, sent his respects to Lord Thurlow, regretting that extreme indisposition prevented him from sitting that day at the Rolls. "What ails him?" roared Thurlow to the bearer of the message. "If you please, my lord, he is laid up with dysentery." "Confound him," exclaimed his lordship, "let him swallow an act of parliament. He'll find nothing so binding"—*Ibid*

## APPOINTMENTS TO OFFICE.

## DEPUTY CLERK OF THE CROWN.

**JAMES CANFIELD**, of the Town of Ingersoll, Esquire, to be Deputy Clerk of the Crown and Pleas, and Clerk of the County Court of the County of Oxford, in the room and stead of William A. Campbell (temporarily acting) resigned. (Gazetted October 14, 1869.)

## CORONERS.

**FREDERICK WILLIAM STRANGE**, of the Village of Aurora, Esquire, M.D., to be Associate Coroner within and for the County of York. (Gazetted November 20, 1869.)

**DANIEL JOSEPH KING**, of the Village of Canonbrook, Esquire, to be an Associate Coroner within and for the County of Perth. (Gazetted November 27, 1869.)

**GEORGE ROILTON**, of the Village of Bothwell, Esquire, to be an Associate Coroner within and for the County of Kent. (Gazetted December 4th, 1869.)

**CHARLES SAMUEL HAMILTON**, of the Village of Roelin, Esquire, M.D., to be an Associate Coroner within and for the County of Hastings. (Gazetted December 18th, 1869.)

**HENRY ADAMS**, of the Village of Embro, Esquire, M.D., to be an Associate Coroner within and for the County of Oxford. (Gazetted December 18th, 1869.)







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